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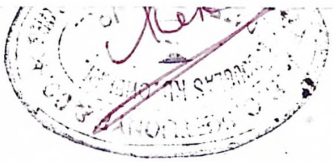

LAW REPORTS

OF THE

NORTHERN REGION

of the Federation of Nigeria

1956

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THE HIGH COURT

of the

NORTHERN REGION OF NIGERIA

1956

Hon. Sir Thomas Algernon Brown, Chief Justice

Hon. Mr Justice Bairamian, Senior Puisne Judge

Hon. Mr Justice Hurley, Puisne Judge

Hon. Mr Justice Smith, Puisne Judge

THE LAW REPORTING COMMITTEE

of the

NORTHERN REGION OF NIGERIA

1956

Hon. the Chief Justice, *ex-officio*, Chairman

Ian McLean, Esquire, Crown Counsel

L. O. V. Anionwu, Esquire, Barrister-at-Law

INDEX OF CASES

CASES JUDICIALLY CONSIDERED

Aladesuru *v* The Queen, 39 Cr. App. R. 184; (1955) 3 W.L.R. 515. *Applied*, Hattab *v* Inspector-General of Police, 1956 N.R.L.R. 24. *Applied*, Garba *v* Inspector-General of Police, 1956 N.R.L.R. 32.

Ayanshina *v* Commissioner of Police, W.A.C.A. 3rd October, 1951 (unreported). *Followed*, Torhamba *v* Inspector-General of Police, 1956 N.R.L.R. 87.

Biobaku *v* Police, XX N.L.R. 30. *Referred to*, Hattab *v* Inspector-General of Police, 1956 N.R.L.R. 24. *Followed*, Ajaegbu *v* Inspector-General of Police, 1956 N.R.L.R. 104.

Chiedu *v* Inspector-General of Police, 1956 N.R.L.R. 69. *Affirmed*, Chiedu *v* Inspector-General of Police, 1956 N.R.L.R. 75.

Cooray *v* The Queen, (1953) A.C. 407; (1953) 2 W.L.R. 965. *Referred to*, Torhamba *v* Inspector-General of Police, 1956 N.R.L.R. 87.

Fashusi *v* Police, XX N.L.R. 126. *Applied*, Emone *v* Inspector-General of Police, 1956 N.R.L.R. 49.

Flatman *v* Light, (1946) 2 A.E.R. 369. *Followed*, Torhamba *v* Inspector-General of Police, 1956 N.R.L.R. 87.

Garba *v* Inspector-General of Police, 1956 N.R.L.R. 32. *Followed*, Onuoha *v* Inspector-General of Police, 1956 N.R.L.R. 96.

Hadley *v* Perks, (1866) L.R. 1 Q.B. 444; 35 L.J.M.C. 177; 14 L.T. 325. *Approved*, Torhamba *v* Inspector-General of Police, 1956 N.R.L.R. 87.

Hattab *v* Inspector-General of Police, 1956 N.R.L.R. 24. *Followed*, Onuoha *v* Inspector-General of Police, 1956 N.R.L.R. 96.

Holmes *v* Director of Public Prosecutions, 31 Cr. App. R. 123; (1945) A.C. 588; (1946) 2 A.E.R. 124; 62 T.L.R. 466. *Applied*, Idi Wonaka *v* Sokoto Native Authority, 1956 N.R.L.R. 19 (F.S.C.).

Katsina Native Authority *v* Abdullahi Kogo, XIV N.L.R. 49. *Applied*, Rabo Maroki *v* Kano Native Authority, 1956 N.R.L.R. 5. *Applied*, Shehu Shayi *v* Kano Native Authority Police, 1956 N.R.L.R. 9. *Applied*, Idi Wonaka *v* Sokoto Native Authority, 1956 N.R.L.R. 15.

Mancini *v* Director of Public Prosecutions, (1942) A.C. 1; 28 Cr. App. R. 65; (1941) 3 A.E.R. 272 H.L.; 58 T.L.R. 25. *Applied*, Idi Wonaka *v* Sokoto Native Authority, 1956 N.R.L.R. 19.

Nzegwu *v* Police, XX N.L.R. 163. *Applied*, Ajaegbu *v* Inspector-General of Police, 1956 N.R.L.R. 104.

Oriaku *v* Police, XX N.L.R. 74. *Applied*, Ajaegbu *v* Inspector-General of Police, 1956 N.R.L.R. 104.

Ormerod *v* Todmorden Joint Stock Mill Co., (1833) 2 Q.B.D. 155; 52 L.J.Q.B. 445; 31 W.R. 759. *Followed*, Emone *v* Inspector-General of Police, 1956 N.R.L.R. 49.

Otti *v* Inspector General of Police, 1956 N.R.L.R. 1. *Followed*, Onuoha *v* Inspector-General of Police, 1956 N.R.L.R. 96.

Rex *v* Adokwu, XX N.L.R. 103. *Approved*, Torhamba *v* Inspector-General of Police, 1956 N.R.L.R. 87.

Rex *v* Barnes and Richards, 27 Cr. App. R. 154; (1940) 2 A.E.R. 229. *Explained*, Ajaegbu *v* Inspector-General of Police, 1956 N.R.L.R. 104.

Rex *v* Chesshire, Lucas and Bottom, 20 Cr. App. R. 47. *Followed*, Chiedu *v* Inspector-General of Police, 1956 N.R.L.R. 69. *Followed*, Chiedu *v* Inspector-General of Police, 1956 N.R.L.R. 75 (F.S.C.).

Rex *v* Essien, W.A.C.A. 25th January 1950 (unreported). *Applied*, Onuoha *v* Inspector-General of Police, 1956 N.R.L.R. 96.

Rex *v* Forde, (1923) 2 K.B. 400; 17 Cr. App. R. 99. *Applied*, Onuoha *v* Inspector-General of Police, 1956 N.R.L.R. 96.

Rex *v* Lesbini, (1914) 3 K.B. 1116; 11 Cr. App. R. 7; 24 Cox C.C. 516; 84 L.J.K.B. 1102; 112 L.T. 175. *Applied*, Idi Wonaka *v* Sokoto Native Authority, 1956 N.R.L.R. 19 (F.S.C.)

Rex *v* Marcellus, XX N.L.R. 155. *Referred to*, Hattab *v* Inspector-General of Police, 1956 N.R.L.R. 24.

Rex *v* Oliver, (1944) 1 K.B. 68; (1943) 2 A.E.R. 800; 29 Cr. App. R. 137. *Applied*, Otti *v* Inspector-General of Police, 1956 N.R.L.R. 1.

Rex *v* Sharpe and Stringer, 26 Cr. App. R. 122; (1938) 1 A.E.R. 48. *Applied*, Ajaegbu *v* Inspector-General of Police, 1956 N.R.L.R. 104.

Rex *v* Simmonite, (1916) 2 K.B. 821; 12 Cr. App. R. 142. *Followed*, Omorere *v* Inspector-General of Police 1956 N.R.L.R. 58.

Seriki *v* Inspector-General of Police, 1956 N.R.L.R. 78. *Followed*, Torhamba *v* Inspector-General of Police, 1956 N.R.L.R. 87.

Sogbanmu *v* Inspector-General of Police, 12 W.A.C.A. 336. *Cited*, Hattab *v* Inspector-General of Police, 1956 N.R.L.R. 24.

LAWS AND ORDINANCES OF NIGERIA JUDICIALLY CONSIDERED

Criminal Code (Cap. 42) Laws of Nigeria

s. 116 (1): Garba *v* Inspector-General of Police, 1956 N.R.L.R. 32.

s. 116 (2): Hattab *v* Inspector-General of Police, 1956 N.R.L.R. 24.

s. 161: Saidu Ahmed Daura *v* Inspector-General of Police, 1956 N.R.L.R. 76.

s. 173: Omorere *v* Inspector-General of Police, 1956 N.R.L.R. 58.

s. 286: Omorere *v* Inspector-General of Police, 1956 N.R.L.R. 58.

s. 287 (1): Omorere *v* Inspector General of Police, 1956 N.R.L.R. 58.

s. 430 (1): Torhamba *v* Inspector-General of Police, 1956 N.R.L.R. 87.

Criminal Procedure Ordinance (Cap. 43) Laws of Nigeria

s 147: Ajaegbu *v* Inspector-General of Police, 1956 N.R.L.R. 104.

s. 154 (*b*): Ajaegbu *v* Inspector-General of Police, 1956 N.R.L.R. 104.

s. 179: Torhamba *v* Inspector-General of Police, 1956 N.R.L.R. 87.

s. 215: Onuoha *v* Inspector-General of Police, 1956 N.R.L.R. 96.

s. 245: Otti *v* Inspector-General of Police, 1956 N.R.L.R. 1.

s. 380: Emone *v* Inspector-General of Police, 1956 N.R.L.R. 49.

Evidence Ordinance (Cap. 63) Laws of Nigeria

s. 73 (1) (*a*): Garba *v* Inspector-General of Police, 1956 N.R.L.R. 32.

s. 177 (2): Ajaegbu *v* Inspector-General of Police, 1956 N.R.L.R. 104.

Magistrates' Courts Ordinance (Cap. 122) Laws of Nigeria

s. 20: Emone *v* Inspector-General of Police, 1956 N.R.L.R. 49.

s. 21: Emone *v* Inspector-General of Police, 1956 N.R.L.R. 49.

MAGISTRATES' COURTS (NORTHERN REGION) LAW, 1955

s. 19: Emone *v* Inspector-General of Police, 1956 N.R.L.R. 49.
s. 20 (*b*): Emone *v* Inspector-General of Police, 1956 N.R.L.R. 49.
s. 85: Onuoha *v* Inspector-General of Police, 1956 N.R.L.R. 96.
s. 97: Onuoha *v* Inspector-General of Police, 1956 N.R.L.R. 96.
s. 97 (*h*): Hattab *v* Inspector-General of Police, 1956 N.R.L.R. 24.

NATIVE AUTHORITY (NORTHERN REGION) LAW, 1954

s. 76: Iyan Katsina Ibrahim *v* Katsina Native Authority, 1956 N.R.L.R. 36.

NATIVE COURTS ORDINANCE (CAP. 142) LAWS OF NIGERIA

s. 10 (2): Baba Ibrahim *v* Dikwa Native Authority, 1956 N.R.L.R. 43.
s. 10A: Rabo Maroki *v* Kano Native Authority, 1956 N.R.L.R. 5.
s. 21: Baba Ibrahim *v* Dikwa Native Authority, 1956 N.R.L.R. 43.
s. 40A (1) (*b*) (*ii*): Shehu Shayi *v* Kano Native Authority Police, 1956 N.R.L.R. 9.
Schedule: Iyan Katsina Ibrahim *v* Katsina Native Authority, 1956 N.R.L.R. 36.

NORTHERN REGION HIGH COURT LAW, 1956

s. 34: Alhaji Amadu John Holt *v* Momo Okah Idah, 1956 N.R.L.R. 81.
s. 47: Otti *v* Inspector-General of Police, 1956 N.R.L.R. 1.
s. 47 (*a*): Hattab *v* Inspector-General of Police, 1956 N.R.L.R. 24; Garba *v* Inspector-General of Police, 1956 N.R.L.R. 32; Omorere *v* Inspector-General of Police, 1956 N.R.L.R. 58.
s. 47 (*c*): Onuoha *v* Inspector-General of Police, 1956 N.R.L.R. 96.
s. 61 (*a*): Shehu Shayi *v* Kano Native Authority Police, 1956 N.R.L.R. 9.
s. 62 (*a*): Shehu Shayi *v* Kano Native Authority Police, 1956 N.R.L.R. 9.

INDEX OF SUBJECT MATTER

Charge—Defect—Name of accused appearing at the top of the charge sheet but not in the individual charges—Accused pleading to charge—Whether accused misled—Defect cured by Criminal Procedure Ordinance Cap. 43—ss. 166 and 167.

Ajaegbu *v* Inspector-General of Police,
1956 N.R.L.R. 104.

Charge—Need to explain charge to accused—s. 215 Criminal Procedure Ordinance Cap. 43.

Onuoha *v* Inspector-General of Police,
1956 N.R.L.R. 96.

Charge of stealing—Evidence of receiving—Calling upon defendant represented by Counsel—whether a prosecution for stealing equally a prosecution for receiving—s. 173 Criminal Procedure Ordinance Cap. 43—s. 286—s. 287 (1) (*b*).

Omorere *v* Inspector-General of Police,
1956 N.R.L.R. 58.

Conviction for lesser offence—s. 179 Criminal Procedure Ordinance Cap. 43—nature of lesser offence contemplated—Whether possible to substitute conviction for unlawful possession for conviction for stealing—Elements of those offences.

Torhamba *v* Inspector-General of Police,
1956 N.R.L.R. 87.

Corroboration—Accomplices—Accused person giving evidence upon his own behalf which incriminates co-accused—In what circumstances the rule as to corroboration applies.

Ajaegbu *v* Inspector-General of Police.
1956 N.R.L.R. 104.

Corroboration—Accomplices—Alleged misdirection—Duty of appellate court to consider record as a whole.

Chiedu *v* Inspector-General of Police,
1956 N.R.L.R. 65.

Defence—Importance of judgment showing that defence has been fully considered.

Otti *v* Inspector-General of Police,
1956 N.R.L.R. 1.

Extortion by Public Officer contrary to s. 99 Criminal Code Cap. 42—Issue whether payment made corruptly or innocently—Admissibility of evidence—Evidence that accused had made a corrupt demand upon a date prior to the transaction which resulted in payment being made.

Chiedu *v* Inspector-General of Police,
1956 N.R.L.R. 65.

Homicide—Provocation—proportionality of blows—manslaughter.

Idi Wonaka *v* Sokoto Native Authority,
1956 N.R.L.R. 19 (F.S.C.).

Licence—Burden of proof—Negative averment—Moneylender—charge of carrying on business without licence.

Otti *v* Inspector-General of Police,
1956 N.R.L.R. 1.

Moneylending—Charge that accused carrying on business without licence —Burden of proving possession of licence—Negative averment.

Otti *v* Inspector-General of Police,
1956 N.R.L.R. 1.

Official Corruption—contrary to s. 98 (1) Criminal Code Cap. 42—Elements of offence—Duties of accused.

Ajaegbu *v* Inspector-General of Police,
1956 N.R.L.R. 104.

Official Corruption relating to offences—s. 116 (1) Criminal Code Cap. 42 —Nature of duty to be performed essential element of offence—Duty of police officer set out in s. 4 Police Ordinance—Court entitled to take judicial notice of those duties—s. 73 (1) Evidence Ordinance Cap 63.

Garba *v* Inspector-General of Police,
1956 N.R.L.R. 32.

Official corruption relating to offences—s. 116 (2) Criminal Code Cap. 42—Bribe offered to police officer to persuade him not to report suspected offence—In fact no offence committed in law—Whether bribe in those circumstances constituted a corrupt interference with the administration of justice.

Hattab *v* Inspector-General of Police,
1956 N.R.L.R. 24.

Plea of Guilty—Whether and when appeal lies from conviction following plea—s. 85 Magistrates' Courts (Northern Region) Law, 1955—s. 97—s. 47 Northern Region High Court Law, 1955.

Onuoha *v* Inspector-General of Police,
1956 N.R.L.R. 96.

Police Officer—Personation of, contrary to s. 64 Police Ordinance Cap. 172—Purpose of section—Object of personation to obtain use of motor vehicle—Whether such right peculiar to police officers.

Seriki *v* Inspector-General of Police,
1956 N.R.L.R. 78.

Police Officer—Personation of, contrary to s. 64 Police Ordinance Cap. 172—Purpose of section—Object of personation to obtain free travel warrant—Whether such right peculiar to police officers.

Torhamba *v* Inspector-General of Police,
1956 N.R.L.R. 87.

Police Officer—Personation of, contrary to s. 64 Police Ordinance Cap. 172—Wording of section—Charge containing words 'not being a member of the public service' instead of 'not being a police officer'—Purpose of section—Effect of wording—Sufficiency of particulars.

Seriki *v* Inspector-General of Police,
1956 N.R.L.R. 78.

Sentence—Jurisdiction of Magistrate Grade II—Consecutive sentences—s. 380 Criminal Procedure Ordinance Cap. 43—Whether limited to aggregate of one year only—s. 19 Magistrates' Courts (Northern Region) Law, 1955—s. 20 (*b*).

Emone *v* Inspector-General of Police,

Stealing charged—Evidence of receiving—Submission of no case to answer—Calling on defendant represented by Counsel—Whether prosecution for stealing equally a prosecution for receiving—ss. 173 and 286 Criminal Procedure Ordinance Cap. 43—s. 287 (*i*) (*b*).

Omorere *v* Inspector-General of Police,
1956 N.R.L.R. 58.

Stealing—Conviction for lesser offence—s. 179 Criminal Procedure Ordinance Cap. 43—Not possible to substitute conviction for unlawful possession.

Torhamba *v* Inspector-General of Police,
1956 N.R.L.R. 87.

Stopping Mails contrary to s. 161 Criminal Code Cap. 42—Retaining letter from pillar box not stopping a mail within the meaning of the section.

Saidu Ahmed Daura *v* Inspector-General of Police,
1956 N.R.L.R. 76.

Unlawful possession—Conviction for lesser offence in accordance with s. 179 Criminal Procedure Ordinance Cap. 43—Conviction for stealing—No power in court to substitute conviction for unlawful possession—elements of both offences contrasted.

Torhamba *v* Inspector-General of Police,
1956 N.R.L.R. 87.

DAMAGES

Claim for loss of money lent—Position where no contract for indemnification or suretyship.

Okoye *v* John Holt and Company Limited,
1956 N.R.L.R. 66.

HIGH COURT

Jurisdiction—Suit pending in competent Native Court—Impropriety of subsequent suit in High Court on same matter.

Alhaji Amadu John Holt *v* Momo Okah Idah,
1956 N.R.L.R. 81.

MAGISTRATES' COURTS

Magistrate Grade II—Jurisdiction—Consecutive Sentences—s. 380 Criminal Procedure Ordinance Cap. 43—Limitation of aggregate of sentences—ss. 19 and 20 (*b*) Magistrates' Courts (Northern Region) Law, 1955.

Emone *v* Inspector-General of Police,
1956 N.R.L.R. 49.

MOSLEM LAW

Breach of the Peace—Whether words alone sufficient to constitute the offence—Minstrel leading wedding procession and shouting abuse—Fight threatening though averted by police—Offence amounting to unlawful assembly in English law—Sentence in excess of that permitted by the Criminal Code—s. 10A Native Courts Ordinance Cap. 142.

Rabo Maroki *v* Kano Native Authority,
1956 N.R.L.R. 5.

Confession of homicide—Proof of confession—Effect of retraction of extra judicial confession by accused.

Idi Wonaka *v* Sokoto Native Authority,
1956 N.R.L.R. 15.

Evidence—Requirement of two witnesses to an act—Assault—Effect of failure to produce the requisite witnesses.

Gani Bauchi *v* Alkali M. Mamudu,
1956 N.R.L.R. 40.

Homicide—Confession—effect of retraction of extra judicial confession—Proof of confession.

Idi Wonaka *v* Sokoto Native Authority,
1956 N.R.L.R. 15.

Homicide—Intentional killing (amdu)—Provocation can never reduce intentional to accidental killing (khata).

Idi Wonaka *v* Sokoto Native Authority,
1956 N.R.L.R. 15.

Plea—Collective plea taken from nineteen persons—Nothing objectionable in Moslem law—Practice considered 'impracticable'—Attitude of High Court.

Shehu Shayi *v* Kano Native Authority Police,
1956 N.R.L.R. 9.

Principle that no man can be a judge in his own cause—Insulting letter to Ruler in Council concerning religious matter—Sentence meted out by Ruler in Court.

Modibbo *v* Adamawa Native Authority,
1956 N.R.L.R. 101.

Proof—Taking the oath—Refusal to take oath—Shifting of oath—Challenge—Acceptance—Procedure.

Baba Ibrahim *v* Dikwa Native Authority,
1956 N.R.L.R. 43.

Procedure—Need for complainant—Alkali commencing proceedings on his own initiative.

Umaru Mafindi *v* Bauchi Native Authority,
1956 N.R.L.R. 41.

Procedure—Order before judgment for payment of money into court and of sale in default—Payment out of money after leave to appeal granted.

Alhaji Amadu John Holt *v* Momo Okah Idah,
1956 N.R.L.R. 81.

Procedure—Ruler in Council receiving insulting letter on religious matter—Ruler in Court passing sentence upon delinquent—No man shall be judge in his own cause.

Modibbo *v* Adamawa Native Authority,
1956 N.R.L.R. 101.

Sale—Allegation of sale with option—Onus of proof—Article in which defect is discovered after purchase—Right to relief—Loss of right by use of article after discovering defect.

Alhaji Amadu John Holt *v* Momo Okah Idah,
1956 N.R.L.R. 81.

NATIVE COURTS

Appeal therefrom to High Court—Duty of High Court to satisfy itself that no miscarriage of justice has occurred.

Shehu Shayi *v* Kano Native Authority Police,
1956 N.R.L.R. 9.

Appeal therefrom to High Court—Principles upon which Appeal Court acts in Criminal appeals.

Rabo Maroki *v* Kano Native Authority,
1956 N.R.L.R. 5.

Appeal therefrom to High Court—Principles upon which Appeal Court approached civil cases.

Alhaji Amadu John Holt *v* Momo Okah Idah,
1956 N.R.L.R. 81.

Contempt of Court—Jurisdiction—Summary punishment in Courts of record—Limitation on sentence in Native Court—s. 10 (2) Native Courts Ordinance Cap. 142—s. 21.

Baba Ibrahim *v* Dikwa Native Authority,
1956 N.R.L.R. 43.

Jurisdiction—Offences against the revenue of the Government of Nigeria excepted—Revenue or funds of a Native Authority—Whether part of the Government Revenue—Schedule to Native Courts Ordinance Cap. 142—s. 76 Native Authority Law, 1954.

Iyan Katsina Ibrahim *v* Katsina Native Authority,
1956 N.R.L.R. 36.

Sentence—Sentence in excess of that permitted by Criminal Code—Breach of the Peace in Moslem Law amounting to Unlawful Assembly in English law—s. 10A Native Courts Ordinance Cap. 142.

Rabo Maroki *v* Kano Native Authority,
1956 N.R.L.R. 5.

CHRISTOPHER OTTI *V* INSPECTOR GENERAL OF POLICE

[C. A. (Brown C.J. and Smith J.) December 9, 1955]
[Zaria—Criminal Appeal No. K/81A/55.]

Conviction for Moneylending—Burden of Proof on the accused to show that he had a licence—important that judgment should show that defence has been fully considered—approach by Court of Appeal to questions of fact.

The appellant was convicted of carrying on business as a moneylender without being in possession of a valid moneylender's licence, contrary to section 5(b) of Cap. 136. No evidence was called by the prosecution to show that he was not in possession of a licence. The Magistrate's judgment merely said that he accepted the evidence of the prosecution; it made no reference to the defence, and one of the grounds of appeal was that he failed to consider the defence.

Held :

(1) The onus of proving that he had a licence is on the accused, as being a fact peculiarly within his knowledge.

(2) In every contested case, whether the judgment is written or oral, it is important that the defence—"however weak or even frivolous"—should be adequately dealt with in the judgment.

(3) The Court of Appeal, in considering an appeal on fact, will be guided by section 47 (*a*) and (*c*) of the Northern Region High Court Law.

Case referred to :

Rex v Oliver (1944) 1 K.B. 68; (1943)2 A.E.R. 800 applied.

CRIMINAL APPEAL.

Beckley for the appellant.

McLean, Crown Counsel, for the respondent.

BROWN C.J. (delivering the judgment of the Court) : This appellant was convicted of carrying on the business of a moneylender without a licence during the month of August.

Otti
v
I.G.P.
Brown C.J.

He was a clerk employed at the School of Pharmacy, Zaria, and in that capacity he used to pay the labourers employed at the School at the end of the month. The prosecution called four of the labourers who gave evidence that the appellant had lent them various sums of money at 25% interest, which he deducted (with the principal) from their pay at the end of the month. There was no document to support the evidence of these transactions; and having regard to the relationship between the appellant and the labourers, and to the fact that all he had to do was to deduct what was due to him from their wages, one would not expect to find documentary evidence.

The defence was that the witnesses had conspired to give false evidence against him. Some support for that defence may be found in a letter from the appellant to the S.M.O. dated 27th July, that is shortly before the alleged transactions, complaining of irregularities on the part of the labourers. In his evidence, which he gave on oath, the appellant agreed that he had lent them money, but denied that he had charged them interest.

The judgment merely says, in effect, that the learned Magistrate accepted the evidence of the prosecution; and one of the grounds of appeal is that he failed to consider the defence.

Except for cases which may properly be dealt with under the provisos to section 245 of the Criminal Procedure Code, it is important that in all criminal cases the judgment should show that the defence– no matter how weak or even frivolous— has received that full consideration which it is the right of every accused person to have. We are not saying that in this case the learned Magistrate failed to give the defence that full consideration. We are complaining that the judgment does not show it. All that we are told is that the Magistrate accepted the evidence of the prosecution : we are not told why. For example, what view did the Court take of the letter of the 27th of July in the light of the defence that the men of whom the appellant complained in that letter had conspired against him ? The Court may have been impressed by the evidence of Dr. Harrison, the S.M.O., that having enquired into the allegations contained in that letter he found nothing in them. Or again the Court may have been unfavourably impressed by the appellant's answer that he did not know why the men conspired against him. Or again the Court may have thought

it unlikely that the appellant, who had complained of the witnesses' bad work, would have gone out of his way, to lend them money free of interest out of the kindness of his heart. But the judgment is unenlightening on those or any other points. We appreciate that under the proviso (*a*) to section 245 of the Criminal Procedure Code it is sufficient if the Magistrate records briefly in the book his decision and delivers an oral judgment. When a case is of a minor and uncomplicated character and the Magistrate considers that it is a proper case in which to deliver an oral judgment it is important that in his oral judgment he should deal adequately with the defence. But in the present case he delivered a written judgment, and not a word is said of the defence. Moreover, even if he was purporting to act under proviso (*a*) of section 245, that proviso requires that the reasons for his decision are to be recorded where necessary. We are of the opinion that in this case his reasons ought to have been recorded.

But although the judgment is open to criticism, it by no means follows that this appeal should be allowed. It cannot be too strongly stressed that sitting as a Court of Appeal we are not here to retry the case on evidence, which we have not heard, of witnesses whom we have not seen. Our duty, upon a question of fact, is to be found in section 47 paragraphs (*a*) & (*c*) of the Northern Region High Court Law. We are to allow the appeal if we think that the Magistrate's judgment should be set aside on the ground that it is unreasonable or cannot be supported by the evidence; or that there was a miscarriage of justice. The question which we have to ask ourselves is not whether we, if we had been in the position of the Magistrate, might have come to a different conclusion. If that was the question, we should answer in this case that *almost* certainly we should have come to the same conclusion as he did. The qualifying word "almost" is only inserted because in no contested case—however clear the evidence may appear to be from the record—can a Court of Appeal, not having seen or heard the witnesses, express itself as being 100% positive upon a question of fact.

The questions which the Law requires us to ask ourselves are : is the judgment unreasonable? Manifestly, in the light of the evidence upon the record, it is not. Can it be supported by the evidence? Manifestly there was ample evidence to

Otti v I.G.P. Brown C.J.

support it. Was there a miscarriage of justice? In the light of the evidence which is upon the record, none whatever that we can see.

But Mr. McLean, as Counsel for the respondent, very properly and fairly drew our attention to a point which had not been made a ground of appeal. That point was that the prosecution had adduced no evidence that the appellant was not in possession of a valid moneylender's licence as stated in the charge. That point has been decided in the case of *Rex v Oliver* (1944) 1 K.B. 68. By section 141 of the Evidence Ordinance when a fact is especially within the knowledge of any person the burden of proving that fact is upon him. And in the English case of *Rex v Oliver* it was decided that where a person is charged with doing an act otherwise than under the terms of a licence, the onus of proving that he had a licence is on the accused, as being a fact peculiarly within his knowledge, and the prosecution is under no necessity of giving prima facie evidence of the non-existence of the licence.

The appeal is dismissed.

Appeal dismissed.

RABO MAROKI *V* KANO N.A.

[C. A. (Brown C.J., Smith J. : Assessors M. Abubakar, Alkalin Alkalai Sokoto; M. Yahaya, Walin Sokoto) January 12, 1956]

[Kano—Criminal Appeal No. K/58A/1955]

Appeal from Native Court—Principles upon which Court of Appeal acts—Mohammedan law—Breach of the Peace—Whether words alone amount to that offence—Offence amounting to Unlawful Assembly under English law—Sentence in excess of that permitted under the Criminal Code—Section 10A Native Courts Ordinance Cap. 142.

The appellant was convicted of Breach of the Peace in the Court of the Emir of Kano, and sentenced to three years imprisonment. The facts were that on the day in question the appellant who was a professional Minstrel was taking part in a wedding procession of some four hundred persons. He was leading the procession and shouting abuse. Upon entering the Wudilawa quarter of the City, a fight threatened though in fact it was averted by the police.

The appellant put forward as his principal ground of appeal the suggestion that his words could never in Mohammedan law amount to a breach of the peace.

Held :

(1) That upon Appeal from a Native Court, the questions for the court were threefold :

(*a*) Does the alleged misconduct constitute an offence under Native Law ?

(*b*) If so, is the offence proved according to the requirements of Native Law ?

(*c*) Is there any likelihood of a miscarriage of justice ?

(2) Mere words are capable of amounting to a breach of the peace under Moslem Law.

(3) There was no miscarriage of justice.

Mazoki v Kano N. A. Brown C.J.

(4) The accused had committed the offence of Unlawful Assembly. The sentence would therefore be reduced to one year's imprisonment in accordance with section 10A Native Courts Ordinance.

Case referred to :

Katsina Native Authority v. Abdullahi Kogo, 14 *N.L.R.* 49 *applied.*

CRIMINAL APPEAL.

Lewis Thomas for the appellant.

McLean, Crown Counsel, for the respondent.

BROWN C.J. (delivering the judgment of the Court)

On the 12th of February 1955 at about 11 p.m. this appellant was in the city of Kano taking part in a wedding procession of some four hundred men. He was leading the procession and shouting : "Sawaba (freedom), Groupers, children of the oppressors, worthless people." One of the witnesses, Amadu, testified that he saw the appellant riding in front of the procession crying : "Groupers, we have come into the herd of oppressors, we have broken their rank and honour, Sawaba before us and Sawaba behind." The Sarkin Dogarai said that when they came to Wudilawa the people of Wudilawa intercepted them and there was about to be a fight which he averted. The appellant was convicted of "disturbing the peace and annoying people" and was sentenced to three years imprisonment.

We agree with Mr. McLean, who appeared for the respondent, that the form of charge matters little. Indeed in a Moslem Court the word "charge" is a misnomer. No specific charge is framed. The alleged misconduct is described. And in approaching an appeal from a Moslem Court we consider that we have to ask ourselves three questions :

(1) does the alleged misconduct constitute an offence under Moslem law;

(2) if so, is the offence proved according to the requirements of Moslem law;

(3) is there any likelihood of there having been a miscarriage of justice ?

In putting forward these three questions we have in mind the passage from the judgment of Brooke, J., with his great experience of native cases, in *Katsina N.A. v. Abdullahi Kogo* and others (14 *N.L.R. at page* 51), in which he says :

> "The first duty of this Court as an Appeal Court assisted by assessors is to say whether full proof has been established under the rules of evidence and procedure of the Court below, and that in the case of a conflict with the principles of justice administered by this Court whether the verdict can be sustained, or whether there is any likelihood of a miscarriage of justice."

In other words, we must satisfy ourselves that the requirements of Moslem law have been complied with. And then, examining the record as men of common sense—and not as English lawyers applying the English rules of evidence—we must ask ourselves whether, for lack of evidence or for any other reason, there is any likelihood of a miscarriage of justice having occurred.

Applying ourselves to the three questions which we have laid down, we must first ask ourselves whether the misconduct alleged in this case constituted an offence under Moslem law. In this matter we are entitled to look to the assessors for their assistance ; and in our opinion, although the calling of assessors is not obligatory by law, it ought to be the standard practice to call them. The Court below relied on four extracts from *Vol.* 2 *of Tabsira* (attached to the record of proceedings). The assessors have referred us to a further authority, *Liya'ullhukkami Chapter* 5 *Section* 2, *page* 59, where it says :

> "In order to protect people a Ruler can impose punishment upon anyone who has uttered abusive language against other people."

These authorities seem to show conclusively the fallacy of that ground of appeal which says that mere words cannot in law amount to a breach of the peace. It would be no less a fallacy in relation to English law. But we must again stress that we are concerned with Moslem law. These authorities satisfy us that the conduct of the appellant constituted an offence punishable under Moslem law. The second question is whether the offence was proved according to the requirements of Moslem law. It was said that there was no evidence to show who were

Maroki v Kano N.A. Brown C.J.

the persons referred to as the "oppressors" and no evidence of what persons those who heard the words thought were being referred to. But there was evidence that the provocative words uttered by the appellant annoyed the people of Wudilawa to the extent that they intercepted the appellant and the wedding party and but for the intervention of the Sarkin Dogarai there would have been a breach of the peace. It is in order to protect the community from such an event, brought about by provocative abuse, that this conduct is treated as an offence by Moslem law. Whoever were the people at whom the abuse was aimed (and we think that the Court could have had little doubt as to the section of the community that was referred to) the people who heard it were as a fact "annoyed," and a breach of the peace was as a fact only averted by the timely arrival of the police. And in addition to the evidence which is upon the record this offence was proved by the appellant's admission in Court when he said, "I repent, I will not do it again," for by Moslem law, as in the case of English law, an offence may be proved by the accused's bare admission.

Lastly we have to ask ourselves if there has been a miscarriage of justice. It appears to us that upon his own admission the appellant used provocative words, which nearly caused a fight, and that violence was only averted by the timely arrival of the police.

But by the proviso to section 10A of the Native Courts Ordinance where an act constituting an offence under native law also constitutes an offence under the Criminal Code, a native court must not impose a punishment in excess of the maximum punishment permitted by the Criminal Code. This appellant could have been convicted under the Criminal Code of the offence of unlawful assembly. The maximum sentence for that offence is one year. In accordance with section 10A of the Native Courts Ordinance the sentence of three years imprisonment must therefore be reduced to one year's imprisonment.

The appeal against conviction is dismissed. The sentence of imprisonment is reduced from three years to one year.

Appeal dismissed.

Sentence reduced to one year's imprisonment.

SHEHU SHAYI AND OTHERS
V
N.A. POLICE, KANO

[C. A. (Brown C.J., Smith J. : Assessors M. Abubakar, Alkalin Alkalai Sokoto : M. Yahaya, Walin Sokoto) January 13, 1956]

[Kano—Criminal Appeals Nos. K/82A/1955, K/84A/1955, K/84A/1955.]

Appeal from Native Court—Collective plea taken from 19 *accused persons—Conflict of principle between Moslem and English procedure—Duty of High Court to satisfy itself that no miscarriage of justice has occurred—Application of section* 61 (*a*) *of the Northern Region High Court Law*, 1955—*that section distinguished from section* 40*A*(1) (*b*) (*ii*) *of the Native Courts Ordinance.*

Nineteen accused persons were convicted in the Court of the Emir of Kano of fighting and causing a breach of the peace in the course of an affray between two rival political parties. In answer to the Alkali's question, which was put to them all collectively, of whether they admitted the offence, they were recorded as having replied collectively : "it is so we did it." Two of the three appellants, immediately after the recording of this collective plea, made statements which indicated that they did not acquiesce in it. The High Court was not satisfied that no miscarriage of justice had occurred and reheard the case under section 62(*a*) of the Northern Region High Court Law, 1955, by calling witnesses whose evidence was taken in accordance with the English procedure.

Held :

(1) *upon the advice of the assessors*, that under Moslem procedure there is nothing legally objectionable in taking a plea collectively from a number of accused persons ;

(2) that where a number of accused persons are recorded as having collectively pleaded guilty the

High Court will always consider that there is a possibility of a miscarriage of justice having occurred ;

(3) that when the High Court decides to "rehear" the case under section 61(*a*) of the High Court Law it is not necessary that the appellant should be required to plead as in the case of a "retrial" under section 40A(1) (*b*) (*ii*) of the Native Courts Ordinance ; but the Court will allow witnesses to be called whose evidence will be taken in accordance with the English procedure ;

(4) that after hearing the evidence the Court was satisfied that the three appellants were guilty of the offence of which they were convicted ;

(5) that the appellants had committed the offence of affray, and the sentence of two year's imprisonment passed on the third appellant must therefore be reduced to one year in accordance with section 10A of the Native Courts Ordinance.

Case referred to :

Katsina Native Authority v Abdullahi Kogo and Others (14 N.L.R. 49, judgment of Brooke J. at page 51) applied.

CRIMINAL APPEAL.

Lewis Thomas for the appellant.

McLean, Crown Counsel, for the respondent.

BROWN C.J. (delivering the judgment of the Court) :

These three appellants, with 16 others, were convicted in the Emir of Kano's Court of fighting and causing a breach of the peace. As we pointed out in the case of *Rabo Maroki*, 1 N.R.L.R., to speak of a "charge" in Moslem procedure is a misnomer. No specific charge is framed, but the alleged misconduct is described. If this offence had been tried under the Criminal Procedure Code, the 19 accused would have been charged with Affray contrary to section 83 of the Criminal Code.

The 19 accused were supporters of two rival political parties, the N.P.C. and the N.E.P.U. The supporters of the N.P.C. and of the N.E.P.U. were all alike convicted, and we think it right to mention that fact in view of one of the grounds of appeal which states that the conviction and sentence were based on

"political reasons." It is only fair to say that Mr. Lewis Thomas, who appeared for the three appellants, did not draw up the grounds of appeal and did not proceed with this ground.

Just as Moslem procedure does not require a formal charge, so it does not require a formal plea. There are no precise rules in Moslem procedure for recording a plea such as are contained in Part XXIV of the Criminal Procedure Code. The Moslem procedure, if such it can be called, for ascertaining whether or not an accused person admits the offence varies from court to court. In this case the following procedure was adopted (we quote from the record) :

> "The Alkali (judge) asked all of them at one time :
>
> You heard that you all fight and cause a breach of the peace, is it so ?
>
> Answer : It is so we did it."

Then it appears from the record that No. 3 appellant and No. 1 appellant made statements which negatived their acquiescence in what we may describe as the collective plea. And all 19 accused persons, including the three appellants, were convicted on their collective plea without any evidence being called.

Addressing ourselves to the second question which we formulated in *Rabo Maroki's* case viz. Has the offence been proved according to the requirements of Moslem law ?, and having regard to section 14 of the Native Courts Ordinance which provides that the practice and procedure in native courts shall be regulated in accordance with native law and custom, we sought the advice of our assessors upon whether the taking of a collective plea from a number of accused persons was in accordance with Moslem procedure. They said that there was no rule against it and that in a case where there were two or three accused persons they would see nothing objectionable. But in this case, where there were 19 accused persons, they criticised it as being impracticable. We pointed out that under the Criminal Procedure Code it would be a ground for quashing the conviction. They said that if a Moslem court was hearing the appeal the fact that all the accused persons had pleaded together and their pleas recorded as one would not of itself be a ground for quashing the conviction.

Here then Moslem procedure is plainly in conflict with the

Shayi & Others v. N. A. P. Brown C.J.

principles of justice administered by this Court ; and applying the passage from the judgment of Brooke, J. in *Katsina N.A. v Abdullahi Kogo and others*, 14 N.L.R. 49, at page 51, we were led to the third question formulated in *Rabo Maroki's* case : was there any likelihood of there having been a miscarriage of justice ?

Where 19 accused persons are recorded as having collectively admitted an offence there must always be, in our opinion, a possibility of a miscarriage of justice. It is impossible to be satisfied that all the accused persons acquiesced in what is recorded as having been collectively said. And in view of the statements made immediately afterwards by appellant No. 3 and appellant No. 1, it is clear that they did not acquiesce. Those two appellants were convicted upon a plea of guilty (we use the familiar term of English law) which they had not made. And in the case of appellant No. 2, who made no statement, it is impossible to be satisfied that he acquiesced in a collective plea alleged to have been made by all.

Therefore, although the practice may not be contrary to Moslem procedure—and we accept the advice of our assessors that it is not—the fact remained that we could not be satisfied from the record that the appellants were guilty of the offence of which they were convicted.

It is clear from section 62 of the Northern Region High Court Law, 1955, that we are not to allow an objection to a proceeding in the Court below on the ground only that there has been a failure to observe a principle of English law or English rule of evidence or procedure. It cannot be too strongly stressed that sitting in our appellate jurisdiction on an appeal from a native court we are not to apply the Criminal Procedure Ordinance to the proceedings in the court below. Where the native court has conformed with its own practice and procedure in accordance with native law and custom—as it has in this case—but as a result this Court, sitting as a Court of Appeal, is not satisfied that a miscarriage of justice may not have occurred, the High Court Law has given us power to enable us to make further enquiry into the matter. Section 61 (*a*) of the High Court Law provides that the High Court may—

> after rehearing the whole case or not, make any such order or pass any such sentence as the court of first instance could have made or passed.

The distinction between this provision and the provision contained in section 40A (1) (*b*) (*ii*) of the Native Courts Ordinance is important. The latter provision gives power to the appellate court to "retry the appellant on the same charge or on any charge which might have been laid on the facts as disclosed by the evidence." Under that provision the appellants would have been required to plead in this Court to a specific charge, and this Court would have tried the case under the Criminal Procedure Ordinance as if it were a court of first instance. But the power which is given to us by section 61 (*a*) of the High Court Law is not to "retry" but to "rehear." And we take the distinction to mean that where a native court has conformed with its customary procedure in accordance with its native law and custom but, in the result, this Court is not satisfied that a miscarriage of justice may not have occurred, we are not to set aside the proceedings in the court below and to substitute a retrial by us under the Criminal Procedure Ordinance, but by a rehearing are to resolve the doubt to which the procedure in the court below, though correct according to native law and custom, has given rise. In the court below the appellants were taken to have admitted their offence by the collective plea. That was not legally objectionable in Moslem law. But because it failed to satisfy us we have reheard the case by allowing both sides to call evidence in accordance with the procedure with which we are familiar—that of examination in chief, cross-examination and re-examination. The evidence called by the prosecution before us consisted of two N.A. Policemen, (being two of the four N.A. Policemen, referred to in the record of the court below) who were sent to the spot in order to stop the fighting. A large number of men were taking part in the fight and among them all three appellants. No. 1 appellant was seen fighting by P.C. Aminu and later according to P.C. Bello, shouting "we must retaliate." 2nd and 3rd appellants were also seen to be fighting and were taken to the police station. All the appellants admitted a fight was in progress. 1st and 2nd appellants denied they took part : 3rd appellant admitted fighting but maintained that he was attacked by one Maiwada and merely defended himself. We accept the evidence of the two N.A. Policemen and find as a fact that all three appellants participated in the affray.

We can have no doubt that these appellants were equally guilty with the other sixteen persons of the offence of which

Shayi & Others v. N. A. P. Brown C.J.

they were charged. And their appeals against conviction are dismissed.

But we would take the opportunity to point out that while we recognise that a native court is not bound by rules of procedure such as are contained in the Criminal Procedure Ordinance and that much latitude in the matter of procedure is allowed by Moslem law, where a number of persons are charged with the same offence it cannot be satisfactory under any law or any form of procedure that a collective plea should be accepted from all. Each one should be asked individually what they have to say. And in the case of any of those whose replies do not constitute an unqualified admission of the offence, the evidence of two witnesses, as required by Moslem law, should be taken to show the part which each one individually played in committing the offence.

By the proviso to section 10A of the Native Courts Ordinance where an act constituting an offence under native law also constitutes an offence under the Criminal Code, a native court must not impose punishment in excess of the maximum punishment permitted by the Criminal Code. These appellants could have been convicted under the Criminal Code of the offence of affray, the maximum sentence for which is one year. In accordance with section 10A of the Native Courts Ordinance the sentence of two years imprisonment, in the case of the No. 3 appellant (Yahaya Sundawa), is reduced to one year's imprisonment.

Appeal dismissed.

(*Editor's Note* : On 12 April, 1956, the Federal Supreme Court refused leave to appeal out of time.

N.B. Appeals to the High Court in criminal cases tried in the Native Courts are now governed by section 67 of the Native Courts Law, 1956, N.R. No. 6 of 1956 : see N.R.L.N. 100 of 1956 in N.R. Gazette of 3 May, 1956, B 149. Section 61 of the Northern Region High Court Law, 1955, has been repealed.)

IDI WONAKA *V* SOKOTO N.A.

[C. A. (Brown C.J., Smith J. : Assessors M. Umoru Chief Alkali of Kano, M. Ibrahim) January 13, 1956]
[Kano—Criminal Appeal No. K/93A/1955]

Mohammedan Law—Homicide—Provocation never reducing "deliberate killing" to "accidental killing"—Confession—Effect of retraction by accused.

The Appellant was convicted of homicide in the court of the Sultan of Sokoto and sentenced to death. The conviction was based solely upon the evidence of three confessions made at different times to different people. In the first two confessions the accused alleged that he had gone to the house of the deceased late at night to recover some money. He alleged that the deceased taunted him with the fact that the money was stolen, that he became angry and struck him down with an axe. In the third confession, the accused introduced the matter of provocation. He alleged that the accused had slapped him three times, and that it was then he had struck him and killed him. He described this in his statement to the Police as an "accidental" killing. At the trial he denied his guilt and the confessions were proved according to Mohammedan Law. The only ground of appeal put forward by the appellant was that of provocation.

Held :

(1) The confession to the Police amounted to a confession of 'deliberate' killing.

(2) Provocation can in no circumstances affect the verdict under Mohammedan Law.

Case referred to :

Katsina Native Authority v. Abdullahi Kogo (14 N.L.R. 49) applied.

CRIMINAL APPEAL.

E. Noel Grey for the appellant.

McLean, Crown Counsel, for the respondent.

Wonaka v Sokoto N. A. Brown C.J.

BROWN C.J. (delivering the judgment of the court): This appellant was convicted solely upon the evidence of three confessions, which he had made at different times to different people, which he retracted in the court below. By Moslem law, as in English law, an offence may be proved by the accused's confession without further evidence. But in Moslem law, where the accused retracts his confession, that confession must be proved by two witnesses. And in this case, the accused having pleaded not guilty, the court below adjourned on the 28th November; and on the 8th December four witnesses were called before the court to prove the accused's confessions.

Applying the passage from the judgment of Brooke J. in *Katsina N.A. v. Abdullahi Kogo and Others*, 14 *N.L.R.* at the bottom of page 51, the proof of the appellant's confessions established full proof under the rules of evidence of Moslem law. But under English law an alleged confession which was retracted in court would have been regarded with suspicion, and mere proof that the accused had made the confession would not have been sufficient to establish the truth of the contents of the confession in the absence of other evidence. There is therefore a conflict with the principles of Moslem law and English law, and we must consider whether there is a likelihood of there having been a miscarriage of justice.

The deceased was found dead in his hut during the night, having incurred a wound in the region of one of his ears from which blood was pouring. Suspicion fell upon the appellant because (*a*) he had been seen in the village that night, (*b*) he had disappeared; and (*c*) he was known to be on bad terms with the deceased because the deceased owed him money. After five days the appellant was found by Sarkin Fada Wonaka and taken under arrest to the village. On the way he made his first confession to Sarkin Fada Wonaka, which was also heard by the witness Basa. In this confession he said that he had gone to the deceased to collect his debt, that the deceased had complained of his coming at night to collect what he, the deceased, described as stolen money, that the deceased had thrown a bag of money at him and told him to take what was due, and that he, the appellant, had become angry and struck the deceased with an axe. His second confession was made when they arrived at Wonaka to Kogo, the village head, in the presence of Sarkin Fada Wonaka.

His third confession was made to Sergeant Isa of the N.A. Police in the presence of Sergeant Ambaya and Constable Garba. He repeated the deceased's taunt about stolen money, but in this third confession he introduced the matter of provocation. He said that the deceased slapped him three times, and that he then struck the deceased with the axe. He described this as an "accidental" killing, and having regard to the distinction in Moslem law between "deliberate" killing and "accidental" killing we think that he must have been using the word "accidental" in its technical sense.

In considering the question of whether there is a likelihood of there having been a miscarriage of justice, we must consider firstly whether there is any ground for supposing that the evidence that the appellant made these confessions may be untrue.

The appellant in his evidence said that he denied his guilt to Kogo, the village head, and to the N.A. Police who, he said, wrote down whatever they pleased. But there is no denial of the confession which he made to Sarkin Fada Wonaka, and the Sarkin has stated that he did not know the appellant before he arrested him. Secondly, we must consider whether there is any ground for thinking that the contents of the confessions which the appellant made may have been untrue, and whether through some form of pressure he may have been persuaded to say what was untrue. But that is not the appellant's story. In the case of the confession which he made to Kogo he says that Kogo abused him and said that he, Kogo, had authority to kill him if he did not speak the truth. But he maintained that despite Kogo's pressure he continued in his denial of his guilt. In the case of the confessions made to Sarkin Fada Wonaka and to the N.A. Police the appellant made no suggestion of any pressure.

But that does not conclude the matter because in his confession to the Police he raised the question of provocation. And this was the only ground of appeal put forward by Mr. Noel Grey who appeared for the appellant. Just as in English law we should have had to address ourselves to the question of reducing the offence from murder to manslaughter, so by this ground of appeal we were required to consider whether the provocation, if it existed in this case, might not have reduced this offence from "deliberate" killing to "accidental" killing.

Wonaka v Sokoto N.A. Brown C.J.

The assessors have convinced us that no analogy can be drawn between English law and Moslem law in the matter of provocation. We put two questions to the assessors in open Court; and the following are our questions and their answers—

Q. Does the confession to the Police at page 6 of the record amount to a confession of "accidental" killing only?

A. It was a confession of a "deliberate" killing.

Q. Would provocation caused by two blows, which resulted in loss of self-control, reduce the homicide from "deliberate" killing to "accidental" killing?

A. No. In no circumstances can provocation under Moslem law affect the verdict.

We see no ground for interfering with this conviction, and the appeal is dismissed.

Appeal dismissed.

(*Editor's Note* : The further appeal to the Federal Supreme Court was dismissed on 20th April, 1956 : see the next page).

IDI WONAKA *V.* SOKOTO NATIVE AUTHORITY

[Federal Supreme Court (Foster Sutton F.C.J., Jibowu F.J. and Abbott Ag. F.J.) April 20, 1956]
[Criminal Appeal No. F.S.C. 34/1956]

The appellant was convicted of deliberate homicide in the court of the Sultan of Sokoto and convicted. The conviction was based upon the evidence of three confessions made at different times to different people. In the first two confessions the accused alleged that he had gone to the house of the deceased late at night to recover some money. He alleged that the deceased taunted him with the fact that the money was stolen, that he became angry and struck him down with an axe. In the third confession, the accused introduced the matter of provocation. He alleged that the deceased had slapped him three times, and that it was then he had struck him and killed him. He described this in his statement to the Police as an "accidental" killing.

At the trial, he denied his guilt and confessions were proved according to Moslem Law. The appellant was sentenced to death. From this conviction and sentence he appealed to the High Court of the Northern Region. On appeal, the only ground put forward was that of manslaughter. The appeal was dismissed. He further appealed to the Federal Supreme Court, contending that the offence amounted only to manslaughter in English law and that the conviction of murder should be reduced accordingly.

E. Noel Grey for the appellant.

Attorney-General Northern Region (*H. H. Marshall* Q.C.) *and McLean, Crown Counsel for the Respondent.*

JIBOWU F.J. (delivering the judgment of the Court) :

The appellant was, on the 8th day of December, 1955, convicted of murder and sentenced to death by the Grade A Court of the Sultan of Sokoto. He appealed against his conviction and sentence to the High Court of the Northern Region of Nigeria sitting at Kano, which dismissed his appeal on the 13th day of January, 1956, and from that judgment he appealed to this Court.

Wonaka v. Sokoto N.A. Jibowu F.J

The only point taken by Counsel on his behalf is that the verdict of murder found by the Native Court was wrong as there was evidence of provocation which should have reduced the offence proved from murder to manslaughter, and Counsel therefore urged this Court to quash the conviction for murder and substitute a conviction for manslaughter.

It is to be observed that the law administered in the Sultan's Court is neither English Criminal Law nor the Criminal Code of Nigeria which distinguishes between murder and manslaughter, but Maliki Law, which divides homicide into two categories, namely, homicide with intent or wilful homicide, and homicide without intent or accidental homicide.

In the Court of the Sultan, the Legal Adviser, who was a member of the Court, declared the offence committed by the appellant to be "Amdi," that is, "Murder by intention."

The Assessors, who sat with the Appellate Judges in the High Court, also advised the Court that the killing was deliberate and not accidental. On the effect of provocation on wilful, intentional or deliberate homicide, their opinion was "In no circumstances can provocation under Moslem law affect the verdict."

The case against the appellant was proved by the confessions he made after his arrest, which he retracted at his trial. The Legal Adviser referred to Sharhar Dasuki Muhtasar, page 291, in part 4 to show that a murderer could be convicted on his own confession, and also on the evidence of a confession made in the presence of two witnesses of good character, even though the murderer retracts his confession.

In this case, Sarkin Fada Wonaka, the 4th witness, and Basa, the 5th witness, gave evidence of the confession made to them by the appellant by the stream "Kas Gimi" on the way to the house of Kogo, the village head; Sarkin Fada Wonaka also gave evidence of the confession made by the appellant to the village head, Kogo, in his presence, and N.A. Police Garba Sokoto, the 6th witness, and N.A. Police Sergeant Ambaya, the 7th witness, gave evidence of the confession made by the appellant to Sergeant Isa in their presence. The prosecution therefore satisfied the condition of proof of a retracted confession.

It therefore appears that the conviction of the appellant was in accordance with the provisions of Moslem law.

We have carefully considered the evidence of the confessions made by the appellant. It was in the last confession to Sergeant Isa that he alleged for the first time that the deceased, Tanko, had slapped him thrice before he lost his temper and struck him down with his axe, and it is on the strength of this confession that the submission of provocation sufficient in law to justify a reduction of the offence from murder to manslaughter was based.

There is no doubt that this confession is an improvement on the first two and we have no difficulty in accepting the submission made by the learned Attorney-General of the Northern Region of Nigeria, who appeared for the Respondent, that the allegation that the deceased slapped the appellant thrice before he was struck down with the axe is an afterthought.

In the first confession the appellant stated that when he went to demand the money the deceased was owing him, the deceased abused him and told him not to bother him at night for stolen money, the inference being that the money lent was stolen money as the appellant was a notorious thief. He went further to state that the deceased threw a bag of money to him and asked him to take what was due to him and leave the rest ; that he, the appellant, grew angry, went out and returned with his axe, and that he then struck Tanko, the deceased, with the axe and he fell down.

The appellant admitted to Kongo that he had killed the deceased.

In the third confession to Sergeant Isa, the appellant also stated that Tanko, the deceased, threw a bag of money to him and asked him to take what he was owing him ; that he refused to do so ; that the deceased pressed him to take the money and he still refused ; that he then walked out, followed by the deceased, who slapped him twice ; that he said nothing until the deceased slapped him a third time when he struck him with his axe and he fell down ; that he then placed him, the deceased, in his entrance room and covered him with a skin and a bed.

Hauwa Wonaka, 1st witness and wife of the deceased, who was awakened by a noise, found the deceased dead in the entrance room covered with a skin and a straw bed. Her cries

Wonaka v Sokoto N.A. Jibowu F.J.

awakened Anace Wonaka, the 2nd witness, who reported the incident to Kogo, the village head, and to Mogaji, the hamlet head, both of whom came and saw the corpse of the deceased with a wound near his ear from which blood was gushing out.

On the question of provocation, the Lord Chancellor, Viscount Simon, in *Mancini v. The Director of Public Prosecutions*, 26, Cr. App. R. at page 74, stated the correct principle of the law when he said : "It is not all provocation that will reduce the offence of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death . . . . The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in *Lesbini*, 11 Cr. App. R. 7 . . . . In applying the test, it is of particular importance (2) to take into account the instrument with which the homicide was effected ; for to retort, in the heat of passion induced by provocation, by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

In delivering the judgment of the Court of Criminal Appeal in *Holmes versus The Director of Public Prosecutions*, Wrottesley J., at page 126, 31 Cr. App. R., accurately stated the law when, inter alia, he said : "On the other hand, the law has always recognised that provocation may induce a person to resentment and may thus negative the intention which is a necessary ingredient in the crime of murder, reducing the unlawful killing to killing without intention or malice and so to manslaughter.

"Thus, if a man be provoked by violence, such as a blow, and retaliate forthwith and death result from that retaliation, he will be guilty of manslaughter and not of murder, provided the retaliation be that which may be expected of an ordinary, reasonable man so provoked and in this connection the instrument used must be taken into account. A blow with the fist is a thing which may readily be expected in such circumstances, but a blow with an axe or a hammer is another matter."

When these principles are applied to the facts disclosed by the evidence of the first confession, it cannot but be held that

there was no sufficient provocation to justify the use of an axe.

Even if the facts disclosed by the third confession had been true, yet it would have been held that the force used by the appellant was out of proportion to the provocation offered, and that the use of such a lethal weapon as an axe on the head of the deceased was by itself sufficient evidence of an intention to kill or cause grievous harm. He cannot therefore be heard to say that he did not intend to cause death or grievous harm. In the circumstances, even under the English law, the provocation alleged would not have justified the use of the axe so as to reduce the offence committed to manslaughter.

The appeal therefore fails and is accordingly dismissed.

JOSEPH HATTAB *V* INSPECTOR GENERAL OF POLICE

[C. A. (Bairamian, Ag. C.J., Smith J.) April 20, 1956]
[Kano—Criminal Appeal No. K/14A/1956]

Criminal Law—Official Corruption contrary to section 116(2) *of the Criminal Code—Bribe offered to persuade police officer not to report suspected offence—In fact no offence committed in law—Whether bribe constituted interference "with the administration of justice"—Ground of Appeal—"Against the weight of the evidence"—Section* 97(*h*) *of the Magistrates' Courts* (*Northern Region*) *Law* (*No.* 7 *of* 1955)—*Section* 47(*a*) *of the Northern Region High Court Law* (*No.* 8 *of* 1955).

The appellant appeared before the Magistrate Grade I at Kano on two charges. The first charge alleged that he had obstructed the highway with his motor car and the second charge alleged that he "did corruptly offer the sum of 2/- to P.C. No. 6176 Buba Gombe, a person employed in the public service of Nigeria to wit the Nigeria Police Force, so that he might refrain from prosecuting you for the offence of obstructing the highway, and thereby committed an offence punishable under section 116(2) of the Criminal Code."

The evidence was that the appellant stopped his car in the middle of the road outside the entrance of the Airport Hotel. A police constable, Buba Gombe, instructed him to move to the special parking place provided, but the appellant declined to do so, saying he would only be five minutes. There was some further conversation and the constable then asked the appellant for his name and address, and stated that he would be prosecuted for obstruction. The appellant at this juncture said "please in the name of God leave me to go ; here is two shillings."

During the hearing of the case, the prosecution were permitted to withdraw the first charge, since it was established that the alleged offence was committed on private property. The case on the second charge proceeded and the appellant was convicted and ordered to pay a fine of £25.

On appeal it was contended firstly that no offence had been committed in law, and therefore the police constable had no authority to bring the first charge ; he was not acting in the due administration of justice, and therefore there could not be on the part of the appellant any corrupt interference with the administration of justice. The second ground was that the decision was altogether "unwarranted, unreasonable and cannot be supported having regard to the weight of evidence." This was amended to read "unreasonable or cannot be supported having regard to the evidence" in conformity with section 47(*a*) of the High Court Law.

Held : (1) If a police officer believes that an offence has been committed by a person, he has a duty to take steps to have him punished. If any person offers him money to deflect him from that duty, that person commits an offence under section 116(2) of the Criminal Code.

(2) The mere fact that the first charge failed was no reason for acquitting the appellant on the second charge.

(3) It is not a sufficient ground of appeal to allege that the decision is against the weight of evidence. In view of s.47(*a*) of the High Court Law in effect the appellant must allege and show that the verdict appealed from is one which no reasonable tribunal could have arrived at—which was not shown in this case.

Aladesuru v. The Queen (1955) 3 *W.L.R.* 515 *:* 39 *Cr. App. R.* 184*; applied.*

Sogbanmu v. Inspector General of Police 12 *WACA* 356, *cited.*
Biobaku v. Police 20 *N.L.R.* 30 *: referred to.*
Regina v. Marcellus 20 *N.L.R.* 155 *: referred to.*

CRIMINAL APPEAL

Hughes for the appellant.
McLean, Crown Counsel, for the respondent.

BAIRAMIAN Ag. C.J. (delivering the judgment of the Court) :

Hassab v. I.G.P. Baitamino Ag. C.J.

This is an appeal against the decision of His Worship Magistrate Hague, who on the 24th January convicted the appellant of an offence under section 116(2) of the Criminal Code.

At the trial there were two counts–

(1) that the defendant drove a car and caused it to obstruct the highway in that he parked it in the centre of the road in the entrance of the hotel —an offence against Reg. 36(3) of the Road Traffic Regulations ;

(2) that he there "did corruptly offer the sum of 2/- to P.C. No. 6176 Buba Gombe, a person employed in the public service of Nigeria to wit the Nigeria Police Force, so that he might refrain from prosecuting you for the offence of obstructing the highway, and thereby committed an offence punishable under section 116(2) of the Criminal Code."

The place where the appellant parked his car was the Airport Hotel, Kano. At the close of their evidence the Police agreed to withdraw count 1 conceding that the alleged offence of obstruction occurred on private property. The appellant gave evidence ; and in a considered judgment he was convicted on count 2.

The ground of appeal he put in was "that the decision is altogether unwarranted, unreasonable and cannot be supported having regard to the weight of evidence." This ground is one which according to section 97(*h*) of the Magistrates Courts (Northern Region) Law, 1955, may be set forth as a ground of appeal. On the other hand it is provided in section 47 of the Northern Region High Court Law, 1955, that—

> "On the hearing of an appeal against a conviction by a magistrate in a criminal case the court shall allow the appeal if they think that the judgment of the magistrate should be set aside on the ground that—
>
> (*a*) it is unreasonable or cannot be supported having regard to the evidence ; or
>
> (*b*) the magistrate has made a wrong decision on any question of law ; or

(*c*) there was a miscarriage of justice,

"and in any other case shall dismiss the appeal"

"Provided etc."

(The proviso is irrelevant here). Section 47 of the High Court Law is quoted in order to stress here what was said from the bench, namely that so far as an appeal on the facts is concerned, it cannot, in view of paragraph (*a*) of the said section, succeed except on the ground that the judgment "is unreasonable or cannot be supported having regard to the evidence." A ground worded in accordance with section 97(*h*) of the Magistrates' Courts Law does not assist an appellant. This is manifest from the decision of the Privy Council in *Aladesuru v. The Queen*, (1955) 3 W.L.R., 515, it being borne in mind that section 47(*a*) of the High Court Law is taken verbatim from section 11 of the West African Court of Appeal Ordinance referred to in the judgment of their Lordships. Their Lordships make it clear that—

> "in order to succeed an appellant must show, in the words of the statute (namely section 11 of the West African Court of Appeal Ordinance), that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not a sufficient ground of appeal to allege that the verdict is against the weight of evidence."

The position therefore is that an appellant may set it forth as a ground of appeal, by virtue of section 97(*h*) of the Magistrates' Courts Ordinance, that the judgment of the magistrate cannot be supported having regard to the weight of the evidence, but in view of section 47(*a*) of the High Court Law that is not a *sufficient* ground of appeal. In effect the appellant must allege and show, in the words of their Lordships, that the verdict appealed from is one which no reasonable tribunal could have arrived at.

This being a point under new legislation, this court did not take the rigorous line of disallowing the ground as framed but gave leave for it to be amended to read in accordance with the terms of section 47(*a*) of the High Court Law, 1955.

The argument of learned counsel for the appellant on ground 1 was half-hearted. There was abundant evidence to support the Magistrate's finding of fact, and indeed on the evidence it was the only reasonable finding to make.

Hattab v I.G.P. Bairamian Ag. C.J.

The more interesting ground is No. 2, which was put in by leave ; it reads as follows :

> That the decision is erroneous in point of law because the second charge brought against the appellant arose directly out of the first charge and the police constable in bringing the first charge, which he had no legal authority to bring, was not acting in the due administration of justice within the meaning of section 116(1) of the Criminal Code. Therefore there was no corrupt interference or attempted interference with the due administration of justice by the appellant within the meaning of section 116 of the Criminal Code.

It will suffice here to say that a person is guilty of an offence if he corruptly offers to give a person employed in the public service in any capacity not judicial for the prosecution or detection or punishment of offenders, e.g. a police constable, any money on account of anything to be done or left undone by the person so employed "with a view to corrupt or improper interference with the due administration of justice."

Mr. Hughes' argument for the appellant under the 2nd ground of appeal was to this effect : be it accepted that the appellant stopped his car in front of the Airport Hotel and that the constable there wanted him to move on and that, as he, the appellant, wished to linger there, the constable wished to take his name etc. on the ground that he was obstructing the highway and that he offered the constable two shillings so as to shut his eyes and mouth—be all that accepted as a correct finding of the facts of the case ; as it was not a public highway, the threat to prosecute was outside the constable's duty ; the constable had no powers ; he was not doing something for the due administration of justice ; and if the appellant offered him two shillings when he said he was arresting the appellant, the appellant was not interfering with the due administration of justice. Mr. Hughes drew attention to the charge, which alleges that the money was offered to the constable "so that he might refrain from prosecuting you for the offence of obstructing the highway" but as there was no offence of obstructing the highway, the constable had no authority or duty to say to the appellant You are obstructing the highway, I am going to charge you ; and consequently no interference with the administration of justice. That

Hattab v. I.G.P.

Bairamian Ag. C.J.

was Mr. Hughes' argument. Mr. Hughes was obviously laying the emphasis on the word "offence" in the charge in the second count.

Mr. McLean, who argued for the Police, pointed to the decision of the Court of Appeal in the case of *Sogbanmu* on the 22nd July, 1948, in which it was said that—

> "an offence under the section (viz. section 116) could be committed without any offence having been committed by the person to be improperly assisted by the peace officer or public servant and shows also that the commencement of judicial proceedings is not prerequisite. It is sufficient if a complaint of an offence has been made to the Police (as was done in this case) which would normally be investigated by the Police to enable them to decide whether to prosecute."

Relying on that decision, Mr. McLean has argued that it is beside the point whether or not there was an offence to prosecute. The constable believed there was an offence committed by the appellant, who also thought there was, and that was why he offered the bribe to stop the constable from reporting ; the constable had a duty to report ; in fact the Police believed there had been an offence of obstructing the highway, for which they prosecuted in the first count ; this was withdrawn at the suggestion of the Magistrate at the end of the evidence for the Police. That was Mr. McLean's argument.

The mischief aimed at in section 116 of the Criminal Code and in sections 98 and 114 thereof has been explained in two judgments of the former Supreme Court—*Biobaku v. Police* and *Reg. v. Marcellus*, respectively at p.30 and p.155 of 20 N.L.R. It is therefore needless to deal with the sections at length ; it is sufficient to say briefly that it is the receiving or the offering of some benefit as a reward or inducement to sway or deflect the officer from the honest and impartial discharge of his duties. The detection of offences is a duty of every police constable. If he believes that an offence has been committed by a person, he has a duty to take steps to have him punished ; and if any person offers him money to deflect him from that duty, that person commits an offence. The due administration of justice on the criminal side requires two things—

(1) that the Police shall carry out their duty of reporting and investigating and prosecuting what they believe are offences ;

(2) that the judges and the magistrates and other tribunals shall deal with the prosecutions honestly and impartially ;

that is the position under section 116 and 114 of the Criminal Code. Whether a person accused of an offence was or was not guilty of it remains unknown until conviction or acquittal ; but those who have the duty of showing that he was guilty and those who have the duty of deciding whether he was or not, must carry out that duty unswayed by any consideration of benefit, and others are equally bound not to try to sway or deflect them with money into showing favour or acting contrary to their duty in any way.

The first argument for the appellant in this case virtually postulates that there cannot be a prosecution under section 116 unless there is a prosecution for an offence of some other sort and a successful one at that. If there was no such other offence, then there could be no improper interference with the due administration of justice : so runs the argument in effect ; hence the virtual postulate as stated. At that rate, if a policeman is bribed to conduct the prosecution inadequately so that the defendant in the case may get off, then the defendant can very well say that the acquittal proves there had been no other offence, and therefore there could have been no charge under section 116 of the Code for improper interference with the administration of justice. The absurdity seems to have occurred to the learned Counsel for the appellant : in reply he said that he did not argue that because the first charge of obstruction failed therefore the 2nd charge of bribery failed also ; he argued in reply that "the Police had no grounds : there could not have been any offence." But that was precisely the point that remained to be decided by a court—whether or not there had been an offence of obstructing the highway. The constable thought there had been such an offence. So must the appellant have thought too. The appellant did not wish to run the risk of being prosecuted and offered money with a view to the case being dropped. The 2nd count charges him with corruptly offering money to the constable "so that he might *refrain from*

Hattab v I.G.P. Bairamian Ag. C.J.

prosecuting you for the offence of obstructing the highway." The right emphasis is on the words "*refrain from prosecuting.*" The Police are bound to prosecute for an offence : they have to allege one in a charge under some enactment or another. The wording of the second count is designed to give the defendant notice of what is alleged against him as constituting the charge under section 116 of the Code : he corruptly offered money to a constable so that he might refrain from prosecuting the defendant; and the 2nd count goes on to tell the defendant what the other offence was for which the prosecution was going to be ; otherwise the defendant might have said that he was not being furnished with sufficient information and could not understand in what connexion he was supposed to have offered a bribe. To obviate any objection that the particulars in the charge under section 116 were inadequate or vague, the 2nd count was so framed as to furnish full particulars of the charge : hence its wording. This explanation of why the 2nd count was drafted in those terms will have cleared away any point in the argument for the appellant.

It is the view of this Court that he was properly charged and rightly convicted on the 2nd count. and his appeal is therefore dismissed.

Appeal dismissed.

YESUFU GARBA *V* INSPECTOR GENERAL OF POLICE

[C. A. (Bairamian Ag. C.J., Smith J.) April 20, 1956]
[Kano—Criminal Appeal No.K/5A/1956]

Criminal Law—Official Corruption contrary to section 116(1) *of the Criminal Code—Duty to be performed essential element of offence—Duties of police officers contained in section* 4 *of the Police Ordinance Cap.* 172*—Court entitled to take judicial notice of that Ordinance—Section* 73(1) (*a*) *of the Evidence Ordinance—Ground of Appeal outside provision of section* 47(*a*) *of the Northern Region High Court Law* (*No.* 8 *of* 1955) : "*Weight of the evidence.*"

The appellant who was a police officer, employed in the investigation branch of the Nigeria Police at Kano was charged with an offence under section 116(1) of the Criminal Code. The evidence was that he asked for a bribe from Knox Ofoegbu and Julius Onyechere, who reported the matter to the police, and were given three marked one pound notes. The same evening the appellant went to Knox Ofoegbu's house, received the marked notes, and, as was found by the learned magistrate, "thereupon undertook to see that the case respecting Knox Ofoegbu would not reach court." The appellant was convicted and sentenced to six months imprisonment. On appeal it was contended firstly that the magistrate failed to consider the duties of the appellant at the time of the alleged offence. The second ground of appeal was that the decision was "altogether unwarranted, ,unreasonable and cannot be supported having regard to the weight of the evidence." The court drew attention to section 47(*a*) of the High Court Law, and this ground was amended to read "unreasonable or cannot be supported having regard to the evidence."

Held :

(1) That the duties of a police officer are set out in section 4 of the Police Ordinance and the court will take judicial notice of them, and

(2) That the court has no power to allow an appeal on

the ground that the decision is "against the weight of the evidence." Under section 47(*a*) of the High Court Law the appellant must show that the decision was "unreasonable" in the sense that no reasonable tribunal would have come to the same decision or that there was no evidence to support the judgment of the magistrate.

(3) In the present case there was evidence to support the charge.

Case referred to :

Aladesuru v. The Queen (1955) 3 W.L.R. 515 ; 39 Cr. App. R. 184.

CRIMINAL APPEAL

Nwajei for the appellant.

McLean, Crown Counsel, for the respondent.

SMITH J. (delivering the judgment of the Court) :

This is an appeal from the conviction of the appellant of an offence under section 116(1) of the Criminal Code, which we dismissed on 18th April and then intimated we would give our reasons later.

The appellant was a police constable of the Nigeria Police, employed in the investigation branch of the Police Force at Kano. He asked for a bribe from Knox Ofoegbu and Julius Onyechere who reported the incident to the police and were given by the police three marked one pound notes to hand to the appellant. That evening the appellant went to Knox Ofoegbu's house, received the marked notes and as the learned magistrate found "thereupon undertook to see that the case respecting Knox Ofoegbu would not reach court."

The point argued by learned Counsel for the appellant under his first ground of appeal was to the effect that the learned magistrate failed to consider the duties of the appellant at the time of the alleged offence, and in support of his contention he relied on *R. v. Kadiri Layole* 12 N.L.R. 44.

We agree that it is an essential element of the offence under section 116(1) that there must be a duty to be performed by the

Garba v I.G.P. Smith J.

person who asks for or receives a bribe, and that duty must be of the kind contemplated by the section. But the evidence required to prove the point will depend on the nature of the appointment of the person concerned. If he be an officer of the public service, it may be necessary for the prosecution to call evidence to show what his duties are. But in this appeal, the person concerned was a police constable whose duties are defined by law and are set out as follows in section 4 of the Police Ordinance :

> "The police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of property and the due enforcement of all laws and regulations with which they are directly charged . . . . "

The prevention and detection of crime and the apprehension of offenders are particular instances of the kind of duty which is contemplated by section 116(1) of the Criminal Code. These duties are imposed on the police by law and are facts of which the courts shall take judicial notice by virtue of section 73(1)(*a*) of the Evidence Ordinance. Once the prosecution has proved that the person is a police officer, judicial notice will be taken of his duties under section 4 of the Police Ordinance and there will be no need to prove in evidence what those duties are. Learned Counsel for the appellant contended that it would nevertheless be necessary to prove the particular duty being performed by a police constable at the time of the offence. We are unable to agree with him on this point. The specific task which a police constable has been instructed to perform at any particular time does not matter. He is not relieved thereby of the duties imposed on him by law. These duties are to be performed by him so long as he continues to serve in the police force.

It so happens in this case that there is evidence which shows that the appellant was employed in the criminal investigation branch of the police force at Kano, and the appellant himself stated that he was investigating the very case in which Knox Ofoegbu was concerned.

The only other ground of appeal was that :

> "the decision is altogether unwarranted, unreasonable and cannot be supported having regard to the weight of the evidence,"

which was amended, with the leave of the Court, to conform to the wording of section 47(*a*) of the Northern Region High Court Law 1955, which is that the judgment "is unreasonable or cannot be supported having regard to the evidence." This is the first of three grounds on which we may allow an appeal from the decision of a magistrate. It will be observed that we may not allow an appeal because it is against the weight of the evidence. This would involve a review on the findings of fact without the advantage of seeing and hearing the witnesses. All we are concerned with is to ascertain if the decision was "unreasonable" in the sense that no reasonable tribunal would have come to the same decision or that there was no evidence to support the judgment of the magistrate.

It may not be out of place to draw attention to the fact that the wording of section 47(*a*) of our High Court Law follows that of the English Criminal Appeal Act 1907 in regard to which, their Lordships said in *Aladesuru v. The Queen* 1955 3 W.L.R. at p. 517 :

> "it has long been established that the appeal is not by way of rehearing . . . . but is a limited appeal which precludes the Court from reviewing the evidence and making its own evaluation thereof."

As to this second ground of appeal, we need only say that the learned magistrate found as a fact that the appellant received the three one pound notes and thereupon undertook to see that the case concerning Knox Ofoegbu would not reach court. Evidence to this effect was given by both Knox Ofoegbu and Julius Onyechere. This evidence which is on the record supports the charge and in our view the appellant was properly convicted.

Appeal dismissed.

IYAN KATSINA IBRAHIM *V* KATSINA NATIVE AUTHORITY

[C. A. (Bairamian Ag. C.J. and Smith J.) April 21, 1956]
[Kano—Appeal No. K/94A/1955]

Native Courts—Jurisdiction—Offences against the revenue of the Government of Nigeria excepted—Revenue or funds of a Native Authority—Native Courts Ordinance : Schedules to Notices 222 *and* 288 *of* 1934—*Native Authority Law of the Northern Region, s.*76.

The appellant was tried in a Grade A Limited Native Court for stealing moneys of the Treasury of a Native Authority. It was argued for him on appeal that the trial court had no jurisdiction, and the Schedule to Notice 222 of 1934, which excludes "offences against the revenue of the Government of Nigeria" was cited (wrongly, as that Notice relates to the Southern Provinces; but there is a similar exclusion in the Schedule to Notice 288 of 1934 in regard to the Northern Provinces). The argument was that a Native Authority was a component part of the Government of Nigeria and therefore its funds were part of the revenue of the Government of Nigeria.

Held : It was plain from section 76 of the Native Authority Law of the Northern Region, especially from paras. (*g*) and (*h*) of sub-section (2), that there was a distinct revenue and other funds of a Native Authority and that these were separate from the revenue of the Government of Nigeria or of a Region; the argument therefore failed.

CRIMINAL APPEAL.

Shyngle for the appellant.

McLean, Crown Counsel, for the respondent.

BAIRAMIAN Ag. C.J. (delivering the Ruling of the Court) :

Mr. Shyngle for the appellant has, with leave, added a ground of appeal that the Chief Alkali of Katsina's Court had no jurisdiction to try the appellant on an accusation of stealing moneys of the Treasury of the Native Authority by reason of

the provision on page 72 of Vol. 9 of the 1948 Laws of Nigeria—the Schedule to a notice under the Native Courts Ordinance—which excepts from the trial court's jurisdiction "offences against the revenue of the Government of Nigeria"; and he has argued that as the Native Authority is a statutory body vested with power to administer an area it is a component part of the Government of Nigeria and therefore its funds are part of the revenue of the Government of Nigeria.

The court therefore invited Mr. Shyngle to look up relevant Ordinances to see whether there was or was not any distinction between the funds of a Native Authority and the revenue of the Government of Nigeria. By way of example the court instanced the salary of a judge and asked whether the Katsina Native Authority could be called upon to pay it out of its Treasury.

After the adjournment Mr. Shyngle referred to section 76 of the Native Authority Law of the Northern Region, No. 4 of 1954. It reads as follows:

"The revenue and other funds of a native authority are hereby delcared to be as follows—

(1) All such funds as are lawfully in the possession of such native authority on the day on which this law comes into operation;

(2) Revenue accruing to such native authority from the following sources—

(*a*) the amount of tax payable to a native authority under the provisions of the Direct Taxation Ordinance;

(*b*) general or other rates imposed under the provisions of sections 77 and paragraph (50) of section 37;

(*c*) fees, fines and penalties payable in respect of or as a result of proceedings in Native Courts within the area of a native authority and the proceeds of sale of any forfeitures ordered by such Native Courts;

(*d*) fees or charges specified by any order or rule made under section 37, 41, 42, 43 or 44;

(*e*) moneys payable to a native authority under the provisions of any other written law;

Ibrahim v. Katsina N. A. Bairamian Ag. C.J.

(*f*) receipts derived from any public utility or trading concern belonging to a native authority ;

(*g*) grants-in-aid out of the general revenue of Nigeria or of a Region ;

(*h*) any particular revenue of Nigeria or of a Region lawfully assigned to a native authority ;

(*i*) the proceeds of loans raised in accordance with the provisions of section 78 ;

(*j*) interest on the invested funds of a native authority, or upon loans made by a native authority ;

(3) Any other moneys lawfully derived by a native authority from any other source whatsoever not hereinbefore specifically mentioned."

It is plain from that section that there is a distinct revenue and other funds of a native authority made up of the moneys set out in the section ; paragraph (*g*) and paragraph (*h*) of sub-section (2) especially make it plain that the general revenue of Nigeria or of a Region is another revenue and so is any particular revenue of Nigeria or of a Region out of which grants may be made or money assigned to become parts of the revenue of a native authority.

It may be added that all the sections from section 76 onwards on Financial Provisions make it abundantly clear that a native authority has its own Treasury as distinct from the Treasury of Nigeria. For example, section 79 makes provision for the objects on which the revenue and other funds of a native authority may be spent : those objects are domestic, and a judge's salary, for example, could not be charged on the funds of a native authority. It is superflous to point to any more of the provisions in sections 76 to 101.

It will perhaps be useful, by way of contrast, to refer to section 3(1) of the Income Tax Ordinance, which states that moneys derived from income tax shall be paid "into the Treasury to the credit of the general revenue" ; the Treasury being by definition in section 3 of the Interpretation Ordinance the Treasury of Nigeria.

Likewise in section 235 of the Customs Ordinance mention again is made of the general revenue.

It is worth noting as an example that pensions of non-European officers are chargeable under section 4 of the Non-European Officers Pensions Ordinance on "the revenues of Nigeria" and also that pensions of European officers are under section 4 of the European Officers Pensions Ordinance chargeable to "the revenues of Nigeria." Nobody would say that "the revenues of Nigeria" were revenues of a Native Authority to which such pensions could be charged.

It is as plain as can be that "the revenue of the Government of Nigeria" is something distinct and separate from the funds or revenue of a Native Authority derived from the sources stated in section 76 of the Native Authority Ordinance; and if any money is handed to a Native Authority from the revenue of Nigeria it becomes part of the funds of the Native Authority in view of section 76.

The exception stated in page 72 of Vol. 9 which precludes a Grade A Limited Native Court (which is the grade of the Chief Alkali appealed from) from trying "offences against the revenue of the Government of Nigeria" does not relate to the revenue or funds of a Native Authority, with which we are concerned in this case.

The trial court had jurisdiction.

GANI BAUCHI *V* ALKALI M. MAMUDU

[C. A. (Bairamian, Ag. C.J., Hurley, J. : Assessors Malam Lawan, Waziri of Zaria, Malam Hayatuddini, Galadima of Zaria) 24 April, 1956]

[Kaduna—Criminal Appeal No. JD/2A/56]

Native Courts—Moslem sacred law—Evidence—Need for two witnesses to assault.

The appellant was convicted of assault on the evidence of the respondent alone.

Held : (On the advice of the Assessors) : that the requirement of Moslem sacred law, that there should be two witnesses to the act, was not satisfied.

CRIMINAL APPEAL from a Native Court.

The appellant in person.

Henderson, Crown Counsel, for the respondent.

BAIRAMIAN Ag. C.J. (delivering the judgment of the Court) :

This is an appeal by Gani Bauchi against the decision of the Chief Alkali of Bauchi, who on 21 November, 1955, sentenced him to four years imprisonment and twenty-four lashes.

The Junior Alkali accused Gani Bauchi of coming to his house and beating him. According to the Junior Alkali, Gani said he came to receive his money, 68/-, which Tanko had come and received from him, and the Junior Alkali said, "I never borrowed money from anybody, let alone you; then he (Gani) started to beat me while standing up;" and that even his horse was frightened and he had a scratch on his head and his hat fell down and his family heard and came.

Gani admitted asking for his money but denied the beating.

There was no eye-witness of the accusation that Gani struck the Junior Alkali. Those who came did not see any striking and the result of it all is that the requirement of Moslem sacred law, that there should be two witnesses to an act, was not satisfied. We are advised by the learned Assessors that the appellant was convicted on inadequate and insufficient evidence. We therefore allow the appeal and set aside the conviction and sentence.

Appeal allowed.

UMARU MAFINDI *V* BAUCHI N.A.

[C. A. (Bairamian, Ag. C.J., Hurley J.) April 26th, 1956]
[Assessors : Malam Lawan, Waziri of Zaria
Malam Hayatuddini, Galadima of Zaria]
[Kaduna—Appeal No. JD/17A/56]

Native Courts—Moslem Law—Need for complainant.

The appellant complained to the Junior Alkali that someone had falsely accused him to their employer that he made a box of Government wood; that someone said it was true; the appellant did not agree and was sworn. The Chief Alkali called for the judgment book and said that the appellant ought not to have been sworn; he began to hear a case of theft and convicted the appellant.

Held: on the advice of the Assessors, that under Moslem Law there must be a complainant who makes a complaint; the Chief Alkali erred in starting a case on his own; and the proceedings before him were null and void.

APPEAL from a Native Court.

Appellant in person.

Henderson, Crown Counsel, for the respondent.

BAIRAMIAN, Ag. C.J. (delivering the judgment of the Court) :

The Chief Alkali of Bauchi found Umaru guilty of stealing Government wood and sentenced him to 6 months imprisonment, from which Umaru has appealed. From what we can gather from the record and from his grounds of appeal it appears that when Umaru was given notice by the European officer under whom he was working and was told that an Ibo fellow-worker had said that he, Umaru, made a box from Government wood, then Umaru went to the Junior Alkali and complained against that Ibo worker on the ground that the Ibo worker had told lies about him and slandered him. It appears from the record of the Chief Alkali that we have, that there was a hearing before the Junior Alkali in which, in answer to Umaru's claim that he had brought the box with him in the

Mafindi v. Bauchi N.A. — Bairamian Ag. C.J.

lorry when he came for work, the Ibo worker said to the Junior Alkali that Umaru had made the box with wood belonging to Government; and that thereupon the Junior Alkali asked Umaru, who said he did not agree and was taking an oath for it; and he was sworn.

Somehow the Chief Alkali came to learn about these proceedings and he sent to the Junior Alkali asking that Umaru and Ben, the Ibo worker, should come to his court together with the Junior Alkali's judgment book; they came, and the proceedings before the Junior Alkali were read out. Then the Chief Alkali said that the accused should not have been sworn, and he began to investigate a case against Umaru of stealing Government wood and heard witnesses and wound up with convicting and sentencing Umaru.

The learned Assessors sitting with us have pointed out that the Chief Alkali did wrong in embarking on a trial of Umaru for the theft of Government wood, on the ground that there was no complaint brought before the Chief Alkali of such a theft. They advise us that under Moslem Law there must be a complainant who makes a complaint, and that they would have expected the European officer in charge of the workshop to appear as the complainant or to send a representative to appear as the complainant, or at least that there should have been a Native Authority policeman as a complainant. In this case the Chief Alkali began to hear a case of theft of Government wood against Umaru without anyone coming to his court as the complainant about this theft. It was the Chief Alkali himself who initiated this case of theft against Umaru merely, it seems, because he came to learn of the proceedings in the Junior Alkali's court; and as to how he came to learn of them or to deal with those proceedings in any way is not apparent from his record.

Under our criminal procedure a criminal case is not begun by a court on its own motion. It is plain from sections 81, 83, 279, 282, 283, to cite no more, of the Criminal Procedure Ordinance, that there must be a complaint and a complainant appearing before a magistrate in order to have a criminal case.

We agree with the learned Assessors that the proceedings before the Chief Alkali were null and void, and quash the conviction and sentence.

Appeal allowed.

BABA IBRAHIM *V* DIKWA NATIVE AUTHORITY

[C. A. (Bairamian, Ag. C.J., Hurley, J.) April 28th, 1956

Assessors : Malam Lawan, Waziri of Zaria
Malam Hayatuddini, Galadima of Zaria]
[Kaduna—Appeal No. JD/9A/56]

Native Courts—Moslem procedure—Mode of proof—Taking the oath—Shifting of oath upon refusal to take it—Challenge—Acceptance—Contempt of court in face of court—Summary punishment—Limitation—Native Courts Ordinance, sections 10(2) *and* 21.

Contempt of Court—Summary punishment in courts of record —Criminal Code Ordinance, section 6.

A village dignitary, who had wrongly taken money from someone, said he gave part of it to the appellant, who was the District Head, saying to him that it was from fining certain people found guilty of adultery. The appellant denied taking it and the court asked the appellant to take the oath, as the other man had no witnesses to giving the money. The appellant was not willing to swear that he had not received the money; the other man then took the oath that he had given the money to the appellant telling him what it was about. The appellant was convicted.

The other case against the appellant arose out of a complaint that a village dignitary had extorted a bribe. The guilty man said he gave part of it to the appellant, who admitted receiving some money but not knowing it was improper money and said that, when he learnt later that it was, he returned it; and he challenged the other man to take the oath that he did not get the money back. The other man took the oath and said that the money he received from the appellant was money due to him as a debt. The court convicted the appellant.

The appellant was also punished for contempt : he was insulting the court in the course of the proceedings, and the court sentenced him to three months for contempt.

Ibrahim v. Dikwa N.A. Bairamian Ag. C.J.

Section 10(2) of the Native Courts Ordinance allows punishment in accordance with native law and custom subject to limitations; in section 21 the punishment for contempt is a fine of £10 or in default imprisonment for one month. Incidentally, section 6 of the Criminal Code Ordinance preserves to courts of record the power of summary punishment for contempt.

The arguments on appeal appear in the judgment.

Held : on the advice of the Assessors :

(1) In the first case the refusal of the appellant to take the oath which the court asked him to take shifted the oath to the other man, and the other man's taking the oath furnished the confirmation required.

(2) In the second case the appellant challenged the other man to take the oath; he took it; and his taking it furnished the proof required.

(3) The trial court had power to punish the appellant peremptorily for contempt, but in view of sections 10(2) and 21 of the Native Courts Ordinance, the punishment for contempt would have to be reduced within the limits of section 21.

APPEAL from Native Court.

Razaq for the appellant.

Henderson, Crown Counsel, for the respondent.

BAIRAMIAN Ag. C.J. (delivering the judgment of the Court) :

Baba Ibrahim, District Head of Gulumba, was sentenced by the court of the Emir of Dikwa to—

(1) a term of 2 months for the first offence of receiving a sum of 14/- knowing it to be in respect of a fine;

(2) to a term of 2 months for the second offence of receiving £2 from Bulama Bukar for his district; and

(3) to a term of 3 months for the offence of slandering the court.

As regards the first offence : someone came to complain to the court that Lawan Tijani of Gulumba fined him £5 3. 0. because his daughter had committed an offence of adultery. As the hearing proceeded it became apparent that the Lawan was guilty of wrongly receiving this money, and the Lawan thereupon said that he gave the Wakili £2 and the Wakili told him to give it to the District Head (Baba Ibrahim, the appellant) whom he found in the stable and to whom he gave 14/- saying to him that this money was from fining some people found guilty of adultery. At that stage the court asked the District Head whether he admitted receiving the 14/-. The District Head denied receiving it. The court wanted him to swear on the Koran as the Lawan had no witness about giving the 14/-. The District Head was recalcitrant but ultimately took an oath, "If I sent a messenger or was the one who asked Lawan Tijani to give me, Billahi Lazi"; whereas what the court had asked him to swear was whether he had received the money or sent the messenger or that Lawan Tijani had given him the 14/-. In effect, the District Head was not willing to swear that he had not received the 14/- from Lawan Tijani; it was immaterial whether he had asked Lawan Tijani to give him the 14/-; what was material was whether he did receive 14/-. His refusal to take the oath in the form in which the court wished him to swear it, shifted the oath under Moslem procedure to Lawan Tijani, who then swore, "If I did not give D.H. Gulumba the money 14/- saying that it was in respect of the fine collected from the people of Mungule for adultery, Billahi Lazi." Thereupon the court was satisfied that the case was proved against the District Head. It was urged upon us by learned Counsel for the District Head, the appellant in this case, that an accused person ought to know what the accusation is that he is faced with, and know it clearly. We agree with that, but it is, in our view, clear from the record that the District Head was facing a complaint by Lawan Tijani of having been given 14/- out of money which Lawan Tijani told him he had received from people of Mungule in connection with a fine for adultery. We do not think that the submission of learned Counsel has substance.

Another submission made by learned Counsel was that as Lawan Tijani had been convicted he could not be a witness whose evidence could convict the District Head. We have explained in what way under Moslem procedure the case was

Ibrahim v Dikwa N.A. Bairamian Ag. C.J.

proved against the District Head; it was because he was not prepared to take an oath denying that he had received the 14/- from Lawan Tijani in the circumstances in which Lawan Tijani said he had given it to him—a refusal which shifted the oath to Lawan Tijani, whose oath thereupon furnished the confirmation needed in the Moslem Law.

As regards the second offence of the £2, someone complained to the court that he was made to pay to Lawan Hasana £2 and another 30/- and another £1 in order that he might preserve or be reappointed to his position as a Bulama of a village. The £2 and the 30/- found their way into the hands of the Wakili who admitted receiving the £2 and the 30/- and who said that the £2 were given to the District Head (Baba Ibrahim, the appellant) and the 30/- were given to the Lawan in repayment of a debt which the District Head owed to the Lawan in connection with his buying a horse. Thereupon the court asked the District Head whether he had received the £2 from Lawan Hasana, and the District Head said, "After 3 days Lawan came to say that the money which I paid you was a debt which we received from Bulama Bukar (the complainant)," and that upon hearing this he refunded the money to them. Then the court asked the Lawan about it and the Lawan denied that the District Head refunded to him any money and said that all he received was the 30/- which were due to him in connection with the horse, and that these were only given to him after this case was started. The District Head admitted that he could not produce any witnesses, but said that the Lawan should take the oath to say that the money which I gave him was not that of Bulama Bukar but of his horse. The court asked the Lawan to swear and the Lawan swore that he received no money from the District Head except the money which the District Head owed him. The argument of learned Counsel again was that this Lawan was an accomplice and therefore his evidence was not sufficient. There is no need to repeat here what we have said above about the way in which the case against the District Head was proved under Moslem procedure.

The other point made by Counsel was that the appellant admitted receiving money but not knowing that it was for a bribe. The appellant could not have received £2 from Lawan Hasana without knowing why it was being given to him. He was bound to ask if he did not know. The appellant goes on to

say that he learnt what the £2 was about 3 days later and thereupon refunded the money. From the proceedings it appears that he did not refund the money, but we have no doubt that he knew what the money was for on the day that he received it and that he shifts his knowledge to 3 days later and pleads that he refunded the money because he knows that it was wrong to have received the money at all. We are of opinion that he was rightly convicted.

As regards the third offence of contempt of court : it has been urged on us that the procedure for an offence of contempt of court under the Criminal Code was not followed in that the appellant was not asked to show cause before he was punished. It would seem that learned Counsel expected that there would have been an ordinary trial for contempt of court in accordance with the provisions of the Criminal Procedure Ordinance. This overlooks the fact that, apart from that procedure, there is the peremptory punishment of persons guilty of contempt in the face of the court while it is sitting, and that power which courts of record have is preserved to them by section 6 of the Criminal Code Ordinance. Here we have a Moslem court which presumably is exercising that power of peremptory punishment, and we are advised by the Assessors that it was competent to the Emir's court to punish the appellant for contempt. Of that contempt there were several instances. For example, the appellant told the court, "You have made a good for nothing trial. You have tried the case of Lawan in order to spoil my name, you have not done the trial correctly." Lower down he told the court, "I would not take the oath since I heard Shehu called and said to Tijani to mention my name (in this matter) for that you better convict me, or to dismiss me, I would not swear in respect of the 14/-. Even if you sentenced me at last I will appeal."

There is, however, this to bear in mind, that a Native Court, in view of section 21 of the Native Courts Ordinance, read together with section 10 sub-section (2) thereof, can only impose a fine not exceeding £10 or 1 month in default for contempt, whereas in this case the court ordered the appellant to go to prison for 3 months for contempt.

We are satisfied on the advice of the Assessors that the appellant was rightly convicted. The Assessors have also

Ibrahim v Dikwa N.A.

Bairamian Ag. C.J.

advised, we think rightly, that the sentences for the first and the second offence were inadequate. It is plain that there was a game of extortion and corruption indulged in by the District Head and other officers who were sharing the money, and we think that the sentences ought to have been more severe. We dismiss the appeal, but alter the sentences as follows :

(1) As regards the first offence of receiving 14/- knowing it to be in respect of a fine, the sentence shall be 4 months;

(2) As regards the second offence of receiving £2 in connection with the appointment of Bulama Bukar, the sentence shall be 8 months ;

(3) As regards the sentence for contempt of court, the sentence shall be a fine of £10, in default of payment, imprisonment for 1 month ;

and we order that the terms of imprisonment shall be consecutive.

If this seems to be hard on the appellant because the others involved did not appeal and are left to serve the lesser terms imposed by the court below, it is to be borne in mind that he is the senior officer who should have set a good example and if anything discouraged his subordinates rather than shared in the moneys wrongly taken by them.

Appeal dismissed.

Sentences altered.

GEOFFREY EMONE *V* INSPECTOR GENERAL OF POLICE

[C. A. (Bairamian Ag. C.J., and Smith, J.) May 2, 1956]
[Zaria—Kano appeal No. K/15A/1956]

Magistrates' Courts (Northern Region) Law, 1955—Sections 19 and 20(b)—Criminal jurisdiction—Magistrates of the second grade—Consecutive terms in one case—Aggregate exceeding one year not allowed.

Criminal Procedure Ordinance—Section 380 on consecutive terms—Magistrates of the second grade—Restriction of one year on aggregate in one case.

Words and Phrases—"Cause"; "Subject to."

Section 20(*b*) of the Magistrates' Courts (Northern Region) Law, 1955, sets out the criminal jurisdiction of a magistrate of the second grade. The section begins with the words "Subject to the provisions of this Law and of any other written law"; it goes on to provide in (*a*) for the jurisdiction of a first grade magistrate by reference to section 19, which relates to the jurisdiction of a chief magistrate; and it proceeds thus in (*b*) :

(*b*) magistrates of the second grade : all those set out in para. (*a*) herein save that the maximum fine and the maximum period of imprisonment shall in no cause exceed a sum of one hundred pounds or a period of one year's imprisonment respectively.

A magistrate of the second grade convicted the appellant on three counts and imposed three consecutive terms amounting to more than one year in the aggregate; he appealed relying on the limitation of one year in the above section 20(*b*).

For the Police the argument was that the opening words of section 20—"Subject to" etc.—incorporated section 380 of the Criminal Procedure Ordinance, which provides that—

> Where a sentence of imprisonment is passed on any person by a court the court may order that the sentence shall commence at the expiration of any other term of imprisonment to which that person has been previously

Ereose v I.G.P.

sentenced so however that where two or more sentences passed by a magistrate's court are ordered to run consecutively the aggregate term of imprisonment shall not exceed four years or the limit of jurisdiction of the adjudicating magistrate whichever is the greater.

A magistrate of the second grade, it was argued, could by virtue of the said s.380, which was the section enabling consecutive sentences to be imposed, impose consecutive sentences up to four years in the aggregate.

In effect the argument for the Police meant that the words "in no cause" in section 20(*b*) of the Magistrates' Courts Law should be read as meaning "in respect of no offence."

Held : The words "subject to the provisions of this Law and of any other written law" are restrictive; read in the context of section 20, as they must be, they have this effect, namely that magistrates may exercise the jurisdiction and powers conferred by the section except in any particular case in which some other enactment excludes or curtails them.

The words "subject to" do not mean "in addition to" besides; therefore the powers on consecutive terms conferred by section 380 of the Criminal Procedure Ordinance were not contemplated in the opening words of the said section 20.

The two sections must be read side by side, and the effect of so reading them is that while a magistrate may impose consecutive terms, if he is of the second grade they must not, in view of the special provision in section 20(*b*), exceed one year in one and the same cause, which means in one case and cannot mean in respect of one offence.

(1) *Ormerod v. Todmorden*, 1882, 8 Q.B.E., 664;

(2) *Fashusi v. Police*, 20 N.L.R., 126.

Appeal against sentence.

Shyngle for the appellant.

McLean, Crown Counsel, for the respondent.

SMITH J. (delivering the judgment of the Court) :

The appellant was tried by the Magistrate Grade II Kano in one trial on a charge containing three counts each of which alleged a separate offence. He was convicted on all counts and sentenced to terms of six months imprisonment on each of the first and second counts and to twelve months imprisonment on the third count. The sentences were to run consecutively and in the aggregate amounted to a term of two years imprisonment.

The only question in this appeal is whether a magistrate of the second grade may in one case impose consecutive terms of imprisonment exceeding one year in the aggregate.

Mr. Shyngle, for the appellant, relied on sub-section 20 (*b*) of the Magistrates' Courts (Northern Region) Law 1955 which reads :

> "(*b*) Magistrates of the Second grade : all those (jurisdiction and powers) set out in paragraph (*a*) herein save that the maximum fine and the maximum period of imprisonment shall in no cause exceed a sum of one hundred pounds or a period of one year's imprisonment respectively ;"

He urged that the power to impose consecutive sentences given in section 380 of the Criminal Procedure Ordinance (Chapter 43 of the Laws of Nigeria) was limited to the period of one year provided in sub-section 20 (*b*) of our Magistrates' Courts Law and that to place any other construction on the language of this sub-section would nullify the effect thereof.

Mr. McLean, for the respondent, contended that a magistrate of any grade, by virtue of the definition of a magistrate in section 2 of the Criminal Procedure Ordinance, could impose consecutive terms of imprisonment aggregating four years ; that the opening words of section 20 of our Magistrates' Courts Law, which read :

> "Subject to the provisions of this Law or of any other written law the jurisdiction and powers of magistrates of the first, second and third grades in criminal causes shall be as follows—"

brought in section 380 of the Criminal Procedure Ordinance and that as this was the section which gave power to impose consecutive sentences full effect should be given thereto.

Emone v I.G.P. Smith J.

The opening words "Subject to the provisions of this Law and of any other written law" in section 20 of the Magistrates Courts (Northern Region) Law are similar to those that occur at the beginning of section 19, to which one must refer in reading section 20. These sections repeat the wording of the corresponding sections 20 and 21 of the Magistrates Courts Ordinance (Chapter 122 of the Laws of Nigeria) which was repealed and replaced by our Magistrates Courts Law. In order to ascertain the intention behind these opening words it will be useful to go back to the Protectorate Courts Ordinance 1933 ; to examine the section of this Ordinance ; and to trace the history of the jurisdiction and powers conferred on Magistrates from 1933 up to the present.

There are two sections of the Protectorate Courts Ordinance 1933 which are relevant, namely section 31, which reads—

> "31. In addition to any jurisdiction conferred by any other ordinance, a Magistrate's Court shall have and exercise original and appellate jurisdiction in civil and criminal matters as in this ordinance provided."

and section 33 (as amended by section 7 of the Protectorate Courts (Amendment) Ordinance 1936) the opening words of which are :-

> "Subject to the conditions prescribed by the Criminal Procedure Ordinance so far as the same are applicable, every Magistrate's Court shall have jurisdiction for the summary trial and determination of criminal cases."

The Protectorate Courts Ordinance made it plain that it was conferring certain civil and criminal jurisdiction on magistrates "*in addition* to any jurisdiction conferred by any other ordinance," and that the criminal jurisdiction conferred was "*subject to*" conditions contained in the Criminal Procedure Ordinance then in force. It is reasonable to infer that there is a distinction between the phrase "in addition to" and the phrase "subject to." The latter phrase as is apparent from the two sections of the Protectorate Courts Ordinance quoted above does not add to but places a limitation or condition on what follows in section 33 in so far as the provisions of the Criminal Procedure Ordinance then existing were applicable to summary trials. For example, a magistrate, when trying a criminal case, could not

validly exercise his jurisdiction unless the defendant was brought before him on a proper charge nor could he do so in particular cases unless the defendant elected to be tried summarily.

Presumably the draftsman of the Magistrates Courts Ordinance (Chapter 122) which repealed and replaced the Protectorate Courts Ordinance had the latter ordinance in mind when drafting the new provisions. He omitted section 31 of the Protectorate Courts Ordinance from these new provisions. He dealt with the civil and criminal jurisdiction of a magistrate of the first grade in sections 19 and 20 respectively of the Magistrates Courts Ordinance, and began each of these sections not with the words "in addition and subject to" but with "subject to" only; and it must be inferred that this was done deliberately.

Section 20 set out the criminal jurisdiction and power of a magistrate of the first grade. As to his jurisdiction, he was informed of the classes of offences he could deal with; and as to his power, what he could do in regard to those offences. For example, he could try an offence punishable with two years imprisonment and impose a sentence of two years; or, in certain circumstances, try an offence punishable with more than two years and impose a term of up to two years only. At the same time the legislature told him that it was not removing any restrictions already in existence; as for example, section 11 of the Registration of Business Names Ordinance (Chapter 195) which provided for a penalty of £5 if a firm having ceased to carry on business failed to give notice to have its name removed from the register. This is an instance of a class of offence which fell within section 20 of the Magistrates Courts Ordinance but the Registration of Business Names Ordinance vested the jurisdiction in the Supreme Court and the opening words of section 20 of the Magistrates Courts Ordinance were intended to warn off a magistrate of the first grade from thinking that this disability under the Registration of Business Names Ordinance was being removed.

The effect of the words "subject to the provisions of this Act" in section 19 of the Judicature Act 1873 was considered by the Court of Appeal in *Ormerod and others v The Todmorden Joint Stock Mill Company Limited* (1882) 8 Q.B.D., p.664. At p.676 of the report Brett L.J. said—

Emone
v.
I.G.P.
Smith J.

"The general right of appeal to this Court is given by the 19th section of the Act of 1873, and the words of that section are : 'The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order save as hereinafter mentioned of Her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of this Act and to such rules and orders of Court for regulating the terms and conditions on which such appeals shall be allowed as may be made pursuant to this Act.' Now, with deference to my Lord, my view of that section, and the one on which I think this Court has hitherto acted, is that the only limitation of appeal 'from any judgment or order' is 'save as hereinafter mentioned,' and that the words 'subject to the provisions of this Act' are in the same condition as the words which are coupled with them, namely, 'such rules and orders of Court' as may be made, and that therefore the words 'subject to the provisions of this Act' are only as to the mode of procedure on appeal, and are not words of limitation of appeal to this Court. It is true that in some cases we have gone further and have said if the Judicature Act has not in terms repealed Acts which say positively that there shall be no appeal those statutes unrepealed remain in force, but that where there are no such statutes then the only limitation is in those words in the 19th section 'save as hereinafter mentioned.' "

Lord Coleridge C.J. at p.673 of the same report, held that—

"The 19th section of the Judicature Act, 1873, gives no doubt in general terms to this Court jurisdiction and power to hear and determine appeals from any order of any judge, *subject to the provisions of this Act*. But if, according to the fair interpretation of the Act itself, certain orders are not intended to be subject to appeal, why then the 19th section will not subject them."

and Holker L.J., at p. 681, after quoting section 19 of the Act of 1873, went on to say :

"The power of appeal which is there given is hardly limited at all, though there is not a universal appeal given against the exercise of discretion. But if one looks at the

subsequent sections and the orders made under the Act of Parliament, one will find that there are cases in which an appeal is excluded, and therefore, if it had been the intention of the legislature to have excluded an appeal in a case like the present, one would have thought that language to that effect would have been used."

These dicta of their Lordships fortify us in the view that the words "subject to" are restrictive and have to be read in their context. We are of the opinion that the opening words of section 20 of the Magistrates' Courts Ordinance were meant to limit or exclude from the jurisdiction and powers conferred by the section on a magistrate of the first grade any special offences or particular powers which by some other ordinance or law a magistrate was informed either specifically or by implication that he had no jurisdiction or powers, or that his jurisdiction or powers were curtailed in some particular respect.

It follows that Section 380 of the Criminal Procedure Ordinance (Chapter 43 of the Laws of Nigeria), which gave a power to impose consecutive terms of imprisonment was not one of the provisions contemplated in the opening words of section 20 of the Magistrates' Courts Ordinance. The effect of section 380 of the Criminal Procedure Ordinance must be determined by considering that section side by side with section 20 of the Magistrates' Courts Ordinance.

Section 20 spoke of the *offences* a magistrate of the first grade could try and of the imprisonment he could impose in respect of those offences, there was no limitation in the section in regard to *a cause*. If two or more offences were included in one charge and heard at one trial there was no restriction in section 20 precluding a magistrate of the first grade from passing consecutive sentences of imprisonment aggregating four years, as provided in section 380 of the Criminal Procedure Ordinance. Both sections were in harmony and full effect could be given to each.

On the other hand, sub-section 21 (*b*) of the Magistrates' Courts Ordinance expressly provided in conferring criminal jurisdiction on a magistrate of the third grade "save that the maximum period of imprisonment shall in no cause exceed. . . a period of three months." The effect thereof read side by side

Emone v I.G.P. Smith J.

with section 380 of the Criminal Procedure Ordinance was this : a magistrate of the third grade could impose consecutive sentences in a case by virtue of section 380 but the aggregate term of imprisonment must not exceed three months because of the express limitation in sub-section 21 (*b*). If this interpretation is not to be adopted then the words "in no cause," which were interpreted in *Fashushi v. Police* (XX N.L.R. p.126) to mean "in no case," must be read as meaning "in respect of no offence"; but the court cannot alter 'cause' to 'offence' particularly in view of the fact that there was no limitation in regard to *a cause* in section 20 of the Magistrates' Courts Ordinance. The legislature deliberately introduced this limitation when conferring jurisdiction on a magistrate of the third grade in sub section 21 (*b*) and effect must be given to it.

Alternatively by applying the maxim *generalia specialibus non derogant* one achieves the same result. Section 380 of the Criminal Procedure Ordinance was a *general* provision on consecutive sentences; sub-section 21 (*b*) of the Magistrates' Courts Ordinance made a *special* provision limiting the powers of a magistrate of the third grade when imposing a sentence of imprisonment; the special provision must prevail and must be read as a tacit qualification of the general provision (*Seward v. The Vera Cruz*, (1884) 10 App. Cas. 59 and *Paddington Burial Board v. Inland Revenue Commissioners*, (1884) 53 L.J. Q.B. 224).

We have striven to decide the question arising in this appeal by a mode of interpretation which conforms to the canon that words must be taken in their ordinary meaning, and that they must be read in the context in which they occur; that effect must be given as far as possible to both sub-section 21 (*b*) of the Magistrates' Courts Ordinance and to section 380 of the Criminal Procedure Ordinance ; and that this is feasible on the maxim of *generalia specialibus non derogant*.

We have dealt with the question as if it arose under the former Magistrates' Courts Ordinance (Chapter 122) for the sake of historical convenience. This Ordinance has been repealed and replaced by the Magistrates' Courts (Northern Region) Law, 1955, which in sections 19 and 20 repeats the wording of the former sections 20 and 21. The fact that a Chief Magistrate is now mentioned in section 19 does not affect

mone
v
I.G.P.
Smith J.

the argument for the purposes of this appeal. Sub-section 20 (*b*) of our Magistrates' Courts Law repeats the wording of the sub-section 21 (*b*) of the former Magistrates' Courts Ordinance except that the sub-section of the new law refers to a magistrate of the second grade. The sub-section says that a magistrate of the second grade shall not impose more than twelve months imprisonment in any one case. Had the legislature intended otherwise we think that some words indicating another intention would have been included in the section.

The aggregate term of imprisonment imposed by the Magistrate Grade II Kano must therefore be reduced to one year. The most convenient way of dealing with the matter is to order that these terms of imprisonment be made concurrent. We do not however wish to appear to be saying that this was a case where concurrent sentences should have been imposed.

Appeal on sentence allowed; aggregate of terms reduced.

BERNARD OMORERE *V* INSPECTOR GENERAL OF POLICE

[C. A. (Bairamian Ag. C.J., and Smith J.) May 5th, 1956]
[Zaria—Appeal No. Z/4A/56]

Criminal Law and Procedure—Charge of stealing—Evidence of receiving—Calling on defendant—Defendant with counsel—Criminal Procedure Ordinance : sections 173, 286, 287 (1) (*b*). *Appeals from Magistrates in Criminal Cases—Northern Region High Court Law : section* 47(*a*)—*Appeal on the facts.*

"Where the law authorises the court under a charge for offence A to convict the defendant of offence B, a prosecution for offence A is equally a prosecution for offence B. . . The word 'charge' in section 286 of the (Criminal Procedure) Ordinance must be construed as including a charge for any offence of which the defendant might be found guilty and the section applied accordingly" : from the judgment *infra.*

The appellant was charged together with two others—a railway tally clerk and a railway porter—with stealing thirty cases of indigo dye from a shed. The cases arrived and were unloaded into the shed under the supervision of the clerk; from there they disappeared. In the same morning the porter called a kit-car, which took thirty cases of the like kind to an address where they were received at once by the appellant. In those days the appellant put on a lorry thirty cases of the like kind and went with them to another town, where he opened a case containing indigo dye and sold some cases. That in brief was the evidence for the Police.

At the close of that evidence Counsel for the clerk and the appellant submitted there was no case to answer, and in reference to the appellant also argued that the evidence against him being evidence of receiving, he ought, pursuant to section 286 of the Criminal Procedure Ordinance, to be discharged on the charge of stealing; to which the answer was for the Police that section 173 of the Ordinance authorised a conviction of receiving under a charge of stealing.

The Chief Magistrate thought the question was whether there was sufficient evidence to convict the appellant either of

stealing or of receiving, and in regard to all the defendants ruled that there was a case to answer. Counsel called the clerk but not the appellant. The appellant was convicted and appealed on the ground (*a*) that he was convicted of an offence on which he had not been called upon to defend himself, (*b*) that he ought to have been discharged on the offence of stealing, and (*c*) that the evidence against him was inadequate.

(As regards (*c*) : the provision in section 47(*a*) of the High Court Law of the Northern Region is that the decision must be "unreasonable or cannot be supported having regard to the evidence"; it had been explained in two earlier cases. The text of the sections of the Criminal Procedure Ordinance is given in the judgment).

Held :

(1) The Chief Magistrate had intimated to appellant's Counsel that the appellant had to defend himself under the charge of stealing not merely on stealing but on receiving as well ;

(2) The prosecution for stealing was by virtue of section 173 of the Criminal Procedure Ordinance equally a prosecution for receiving : the appellant could not have been discharged, but had to defend himself both on stealing and on receiving ;

(3) The evidence proved that the appellant had received the stolen cases knowing them to be stolen, but he declined to say anything which might raise any doubt on his guilt; and he failed to show in the appeal that the decision was unreasonable or could not be supported having regard to the evidence.

Cases cited :

Joseph Simmonite, 12 *Cr. App. R.*, 142 ;

Joseph Hattab on appeal in the High Court of the Northern Region, 20th April, 1956, 1956 N.R.L.R., p. 24.

Yusufu Garba there, 1956 N.R.L.R., p. 32.

CRIMINAL APPEAL from a Magistrate.

Ovie-Whiskey for the appellant.

Nunan, Ag. Senior Crown Counsel, for the respondent.

BAIRAMIAN Ag. C.J. (delivering the judgment of the Court) :

Omorere v I.G.P. — Beitamian Ag. C.J.

The appellant and two others were accused before the Chief Magistrate of stealing certain goods; and the appellant, who was defendant No. 3, was convicted of receiving, of which he now complains on these grounds (in effect) :

(1) that he was convicted of an offence without being called upon to defend himself on that offence ;

(2) that the charge being one of stealing, he ought to have been discharged on that charge pursuant to section 286 of the Criminal Procedure Ordinance ;

(3) that the evidence was inadequate against him.

The evidence for the Police was that the goods were stolen from a Railway Shed in Zaria and taken to certain premises, where they were received by the appellant. At the close of that evidence, Mr. Beckley, who appeared for defendant No. 1 and No. 3, the appellant, submitted that there was no case to answer, stressing in regard to the appellant that as the charge was one of stealing, he was entitled to be discharged under section 286 of the Ordinance, which provides that—

> If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the defendant sufficiently to require him to make a defence the court shall, as to that particular charge, discharge him.

Mr. Nunan, Crown Counsel appearing for the Police, referred to section 173 of the Ordinance, which provides that—

> When a person is charged with stealing anything and it is proved that he received the thing knowing the same to have been stolen, he may be convicted of receiving stolen property under section 427 of the Criminal Code although he was not charged with that offence.

The learned Chief Magistrate thought the question was whether there was sufficient evidence before him to convict the appellant either of stealing or of receiving the property described in the charge. He quoted the following passage from Maxwell on the Interpretation of Statutes (9th ed.) at p.23 :

> "Every clause of a statute should be construed with reference to the context and the other clauses of the Act,

> so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

He went on to say that in construing section 286 reference must be made to section 173 ; and he ruled that the appellant, as also the two others, had a case to answer on the facts. Mr. Beckley then stated that the appellant would take no further part in the proceedings, but that defendant No. 1 would make his defence, and he called No. 1 to give evidence.

This account makes it clear that Mr. Beckley understood that he was being called upon for the defence of his clients under section 287(1)(*b*), which provides that—

> If the defendant is represented by a legal practitioner, the court shall call upon the legal practitioner to proceed with the defence.

The Magistrate had intimated that the appellant had to defend himself under the charge of stealing not merely on stealing but on receiving as well. Thus there is no substance in what is set out above as ground No. (1).

As regards ground No. (2), the question arises whether the appellant was entitled to be discharged. Section 173 of the Ordinance enables the court to convict of receiving under a charge of stealing although the defendant was not charged with the offence of receiving. We asked Mr. Ovie-Whiskey, who appeared for the appellant, to explain in what way that section could operate if at the close of the evidence for the prosecution, where the evidence was of receiving, the defendant was to be discharged on the charge of stealing before the court : for then there would be no charge left on which to proceed. Mr. Ovie-Whiskey, as we understood him to say, argued that the magistrate ought to have called upon the appellant, without discharging him, to answer a case of receiving. This argument virtually abandons ground (2), namely that the appellant ought to have been discharged, and introduces a new ground, namely that upon the evidence the appellant ought to have been called upon to defend himself on receiving only. There are difficulties in the way of accepting this argument.

When goods are stolen by a person, and are at once taken to another, one is inclined to suspect that they had formed a con-

Omorere v I.G.P. Bairamian Ag. C.J.

spiracy ; which imports that the receiver had counselled and procured the actual thief to steal ; and that would make the receiver liable to be charged with stealing under section 7 of the Criminal Code, which provides that when an offence is committed "any person who counsels or procures any other person to commit the offence" is deemed to be guilty of the offence. The aim of section 173 of the Criminal Procedure Ordinance is to leave it an open question until the time of the verdict whether a person charged with stealing was guilty of stealing or of receiving. The defendant may be convicted of either ; which means that when he is called upon to defend himself, he must defend himself both as to stealing and to receiving. It seems to us that the learned Chief Magistrate was right in saying that the appellant, who was charged with stealing, was bound to defend himself on receiving as well, under that charge.

We mentioned the case of *Joseph Simmonite* (12 C.A.R. 142) during the hearing as relevant to the point. *Simmonite* was indicted for incest with his daughter, a girl of nine ; the law authorised a conviction of defiling a girl under thirteen under an indictment of incest ; and another provision authorised a verdict of indecent assault under a charge of defilement ; he was convicted of indecent assault, and appealed. Lord Reading, C.J. said as follows :

> "The indictment in form and in terms was under the Punishment of Incest Act, 1908, but the appellant for this purpose must be regarded as indicted both for the offence of incest and—if the jury thought fit not to find him guilty of that offence—for an offence under s.4 of the Criminal Law Amendment Act, 1885 (that is to say, defilement of a girl under thirteen). That is the true meaning of the language of the statute. Once we come to that conclusion all difficulties are resolved, because this case must then be regarded as the trial of the appellant for an offence under s.4, and s.9 (the section which enables a conviction for indecent assault) therefore, will undoubtedly apply. The indictment is stated to be an indictment under the Punishment of Incest Act, and incest is, under s.3 of the Indictments Act, the specific offence charged against the appellant therein, but an indictment for incest in certain circumstances carries

with it and includes an indictment for an offence under s.4 (or s.5) of the Criminal Law Amendment Act, 1885."

This is high authority for saying that where the law authorises the court under a charge for offence A to convict the defendant of offence B, a prosecution for offence A is equally a prosecution for offence B. In the case in hand the prosecution for stealing was, by virtue of section 173 of the Criminal Procedure Ordinance, equally a prosecution for receiving. The line taken by Chief Magistrate Reed on the submission made to him was therefore unimpeachable.

As already indicated, there is no substance in ground 2 (as above set out) of the appeal, and no validity in any part of the argument. The argument would render nugatory the said section 173 and is therefore unsound. The proper way to construe enactments is on the maxim *ut res magis valeat quam pereat*. The word "charge" in section 286 of the Ordinance must be construed as including a charge for any offence of which the defendant might be found guilty and the section applied accordingly.

We have dealt with what was really one ground of appeal as set out and amended in the grounds of appeal, in two compartments for the sake of convenience. Here we may observe that what we said above with reference to what we dealt with as ground (2) applies equally to what we dealt with as ground (1). And now we pass to the last ground of appeal in the memorandum of grounds put in ; the intermediate grounds were given up; we are treating the remaining ground as No. (3) for convenience' sake.

This other ground of appeal relates to the findings of fact made against the appellant. The learned Chief Magistrate went through the evidence for the Police with great care. He concluded that the goods in question, namely 30 cases of dye-stuff consigned to the C.F.A.O., Zaria, who never received them, came to Zaria on the 24th May, 1954, and were unloaded into a goods shed from which they were removed during the same morning ; that during the same morning witnesses 15 and 16 took from the shed 30 similar cases in a kit-car to a house in Zaria, where the appellant took delivery of them ; that the evidence of witnesses 17 to 25 showed that towards the end of May

Omoreru v I.G.P. Bairamian Ag. C.J.

the appellant was in possession of 30 cases similar to those which had come for the C.F.A.O. and were removed from the shed on the 24th May ; that the 30 cases delivered to the appellant on the 24th May were the 30 cases of the C.F.A.O. which had been stolen from the shed ; and that when the appellant received them he knew they were stolen property.

The criticism on appeal of these findings is that there was no evidence, apart from what witnesses 22 and 23 stated, as to what the goods were that were brought to the appellant ; that no stolen goods were found in his possession or control ; that the witnesses could not identify the dye-stuff stolen ; that there had been no stealth ; and that the circumstantial evidence was not strong enough.

Witness 22 (Kokori) bought eight cases of dye from the appellant at Kano, and took them to witness 23 at Maiduguri. From witnesses 17 and 18 one learns that the appellant transported 30 cases from Zaria to Kano, where he opened a box, in which there were tins, one of which he opened: witness [18] saw it was dye-stuff : the appellant asked him to find buyers. This is useful evidence ; the most important evidence is that of witnesses 15 and 16.

According to witness 15, defendant No. 2, a railway porter, asked him to go to the goods shed with his kit-car ; there that defendant loaded 25 cases, and witness 15 took them to the place to which that defendant directed him ; and witness 15 goes on to say :

> "When I got there I saw 3rd accused (viz. the appellant). 3rd accused told my boy to off-load the cases and take them inside the yard. I then went back to Railway Goods shed. 2nd accused gave me 5 more cases. 2nd accused told me to take the 5 cases to the same place. I did so. There I did not meet 3rd accused but my boys put the 5 cases in the same place as they had put the 25 cases. Before we left 3rd accused returned. He asked if we had finished. I said Yes."

His last answers were that he saw the appellant outside the compound and put the loads in the yard because the appellant instructed him to put them in the yard. That witness was con-

firmed by witness 16, his motor apprentice. Their evidence proves that the appellant received the cases stolen from the shed by the tally clerk and the porter (defendants 1 and 2): their complicity made stealth unnecessary. To argue that on that account it was not unreasonable to say that the appellant did not know that the cases for which he was waiting were stolen is to fly in the face of the evidence. The evidence makes it clear that he and the tally clerk and the porter—at least he and the tally clerk—conspired to steal the cases of the C.F.A.O. which the appellant would receive and dispose of; and he received them in pursuance of their conspiracy. The appellant denied the charge in the court below; his denial imported that he had not stolen or received the cases; the evidence proved that he had received the stolen cases knowing them to be stolen; but he declined to say anything in defence which might raise any doubt on his guilt.

We do not wish to repeat here what we said in the appeal of *Joseph Hattab* and that of *Yesufu Garba* at Kano on the 20th April, 1956, in regard to s.47(*a*) of the Northern Region High Court Law. The present appeal fails.

As for the sentence we see no reason to interfere. The goods were worth about £1,000.

Appeal dismissed.

BEN N. OKOYE *V* JOHN HOLT & CO. LTD.

[C. A. (Bairamian Ag. C. J. and Smith J.) 5th May, 1956]
[Zaria—Appeal No. Z/6A/1956]

Damages—Claim for losses of money lent—Where no contract for indemnification or suretyship. Practice and Procedure—Claim which does not disclose a valid cause of action.

The appellant sued for damages for breach of contract. He alleged that the respondent Company gave him advances for distribution among farmers, and that the Company agreed to give him weighing scales but failed to supply them, with the result that he could not buy groundnuts from the farmers and lost the moneys which he had advanced to them; and these he claimed from the Company as damages. The trial Magistrate found against him, and he appealed.

Held:

The basis of the claim was in substance a non-existing contract of suretyship or indemnification; and the claim ought to have been struck out *ab initio* on the ground that it did not disclose a valid cause of action.

CIVIL APPEAL from a Magistrate.

Razaq for the appellant.

Hughes for the respondent.

BAIRAMIAN Ag. C. J. (delivering the judgment of the Court):

The claim of the plaintiff, now appellant, was for £500 "being damages for breach of contract in that during the 1953-54 produce season the defendants, after advancing £1,000 to the plaintiff for distribution to farmers, failed to supply the plaintiff, as agreed, with weighing scales to operate the three stations, viz. Wagini, Gundawa, and Gwurjo, with the result that the plaintiff was not able to buy the produce (groundnuts) for which the money had been distributed, consequently the plaintiff could not employ

Ben. Okoye
John Holt
Bairamian Ag. C.J.

himself and staff to other money-earning concerns (and) thereby suffered damages."

From that claim it appears that the damage suffered was due to the fact that "the plaintiff could not employ himself and staff to other money-earning concerns" owing to the failure of the Company to supply the promised scales. In the better particulars furnished later it is stated that he lost £505 at the three stations, an amount which "represents the amount advanced to the farmers which the plaintiff was unable to collect," which is a new cause of action and a novel basis for claiming damages.

It was put to us in this way : The Company gave advances to the plaintiff so that he might buy groundnuts for them; he in turn gave advances to farmers so that they might bring him groundnuts to buy; the Company promised to supply him with scales but failed to do so; it was unlawful to buy without scales; therefore he could not buy from the farmers and lost the sums he had advanced to them.

The above argument imports proof that the Company had promised to supply scales for Gundawa and Gwarjo (the claim in respect of Wagini was given up because he managed to have a scale there on rent) and that it was unlawful to buy without scales at those two places. The plaintiff has not been able to adduce any regulation which forbade the buying of groundnuts at those two places without scales; and the learned Chief Magistrate did not believe that the Conpany promised to supply him with scales.

Let it be assumed, however, that the Magistrate went wrong in his findings of fact; there still remains the important question whether the plaintiff could claim that the Company should re-imburse him for moneys he advanced to farmers so that he might be able to buy more groundnuts and make a larger profit on commission. The basis of such a claim would have to be that the Company were insurers who had undertaken to indemnify the plaintiff for bad debts. This implication, that they were insurers though there had been no contract of insurance or sureties for persons they were never consulted about, was overlooked; the plaintiff succeeded in glossing over the true basis of his claim by alleging it as a claim in damages.

Ben. Okoye
v
John Holt

Bairamian
Ag. C.J.

The truth of the matter seems to be that the plaintiff having failed in a claim against the Company and suffered judgment besides on a counterclaim in another case, thought of making the present claim so as to recover the amount of the judgment against him. There was also another claim by him for rent of a scale, which also failed. The plaintiff would be well advised to pause before launching another action against the Company on some new basis which he may excogitate in regard to that particular buying season. It is bound to give rise, as it did in the present case, to the question whether he is not being vexatious. Apart from that, there was also the question in the court below whether his claim disclosed a valid cause of action. It would have been a blessing to all concerned if his claim had been struck out on the ground that it did not; for, as we have said, the basis of his claim was in substance a non-existing contract of suretyship or indemnification.

The appeal was dismissed with costs to the Company for the reasons set out above.

Appeal dismissed.

SIMEON GLADSON UZO CHIEDU *v* INSPECTOR-GENERAL OF POLICE

[C. A. (Brown, C. J. and Hurley, J.) February 17, 1956]
[Jos—Criminal Appeal No. JD/6A/1956]

Criminal Law—Extortion by a public officer—issue whether payment accepted corruptly or innocently—evidence that accused had made a corrupt demand upon a date prior to the transaction which resulted in the payment which is the subject of the charge is admissible upon that issue—misdirection in corroboration of an accomplice's evidence—the appellate court will consider the record as a whole.

The appellant, a first class Customs Officer whose duties included the issue of permits for exporting cement to Fort Lamy, was convicted of accepting for the performance of his duty the sum of £5-10*s*-0*d* beyond his proper pay and emoluments, contrary to section 99 of the Criminal Code. The complainant said that the payment which was made by cheque was given by him as a bribe. The defence was that it was received innocently in repayment of a loan.

That was the sole issue in this case. The Magistrate held that the complainant was an accomplice and that his evidence was corroborated in two particulars:

(1) the fact of payment,

(2) his view that the accused's evidence was false.

A document was admitted in evidence which showed that upon a date prior to the transaction which resulted in the payment of the cheque for £5-10*s*-0*d* the appellant had made a corrupt demand of the complainant. At the trial this document was tendered in evidence in support of a charge which the prosecution subsequently withdrew. When this charge was withdrawn no application was made that the document should be withdrawn; no objection had been made to its going in; no cross-examination by the appellant's counsel had been directed to it; no explanation had been given by the appellant of it; and the document remained upon the record as an exhibit "unchallenged and unexplained".

Held:

(1) The Magistrate misdirected himself in holding that, upon the issue of whether the payment was corrupt or innocent, the fact of payment (which was not denied) and his belief that the appellant had given false evidence (which belief "begged the question and avoided the issue") were factors which were corroboration of the accomplice's evidence.

Chiedu
v
I.G.P.
Brown C. J.

(2) Evidence that the appellant had made a corrupt demand upon some date prior to the transaction which resulted in the payment which was the subject of the charge was admissible in evidence as going directly to the issue of whether the payment was corrupt or innocent.

(3) The document in question afforded such evidence and was therefore relevant to the charge upon which the appellant was convicted.

(4) The appellate court must consider the record as a whole, and this document was part of the record.

Case referred to:
Rex v Chesshire, Lucas and Bottom 20 Cr. App. R. 47.

CRIMINAL APPEAL

Ikpeazu for the Appellant.

Lewis, Crown Counsel, for the Respondent.

Brown, C. J. (delivering the judgment of the Court): The appellant, who was a first class Customs Officer with thirteen years service, was convicted of accepting the sum of £5-10*s*-0*d* for the performance of his duty, the sum being a reward beyond his proper pay and emoluments, contrary to section 99 of the Criminal Code. The principal witness for the prosecution was one Elbaff who is employed as the agent of a transport syndicate at Maiduguri. His testimony was that in April and May of last year he exported twenty-two tons of cement from Maiduguri to Fort Lamy in two of his syndicate's lorries. Customs permits to export the cement were required; and it was the appellant's duty to issue them. He said that at the beginning of May he saw the appellant about the issue of the permits and that the appellant said that he would not issue them unless he was given 5*s* on each ton of cement. This amount Elbaff agreed to pay; and in the evening of the following day, at Elbaff's house, payment was made by cheque for £5-10*s*-0*d* which is in evidence as Exhibit B. It is dated 6th May. The cheque was endorsed by the appellant and was cashed a few days later. Elbaff said that he knew it was a bribe, and he knew that it was wrong; but he also knew that unless he paid the money he would not have been able to export the cement. As a result of the payment the permits were issued and the lorries proceeded to Fort Lamy.

At the beginning of July the appellant held up five of Elbaff's lorries, having raised his price (according to Elbaff) from 5*s* a ton to 10*s* a ton, which Elbaff refused to pay. Faced with this situation, Elbaff said that he reported the matter to the Resident and showed him several letters which he had received from the appellant together with the counterfoil of Exhibit B. This evidence was elicited by the appellant's

Chiedu v. I.G.P. Brown C. J

counsel in his cross-examination of Elbaff. On the 8th of July the appellant wrote a letter to the Police (Ex. J.) reporting Elbaff for smuggling French brandy and asking for Police assistance to search his premises. The search was made on the following day and one and three quarters bottles of brandy with two empty cases, and a bag of lottery tickets, were found. Elbaff said that he made his report to the Resident on the day before the search.

In a statement made to the Police (Ex. D) the appellant said that Elbaff, with whom the appellant had been on friendly terms, had made these allegations out of malice on account of the appellant's report. The appellant denied on oath that the cheque for £5-10*s* was given as a bribe and said that it was given in repayment of various small loans amounting to £2-10*s* and one larger loan of £3, which he had made to his friend Elbaff. He said that when these loans reached the total sum of £5-10*s* he "thought it was getting rather heavy", so he asked Elbaff for a refund. He was asked in cross-examination when he lent the larger sum of £3. He replied at first: "about the end of May", and then corrected himself to "between April and May". And then, when asked which he meant, he said "about the beginning of May." He was then asked why he decided that the amount was getting "rather heavy" so soon after he had made the loan of £3. To that question he was unable to give an answer.

It is very clear that of the two witnesses the learned Magistrate preferred Elbaff to the appellant; and from the middle of page 29 to the top of page 31 he gives his reasons for doing so. He then addressed himself to the question of whether Elbaff was an accomplice, and held that he ought to be so regarded. And having warned himself of the desirability of corroboration he proceeds as follows:—

"There were however two corroborative factors, namely the "payment itself and the false evidence given by the accused."

It is with regard to that passage in his judgment that we are unable to share his views.

Mr. Lewis for the respondent said that one of the ingredients of the charge which the prosecution had to prove was that the appellant "accepted" the sum, and that the fact of payment was corroborative of that. If that is what the learned Magistrate meant (and we do not think it was) we can only say that he missed the point. The issue which he had before him was not the payment, which was admitted, but whether the payment was a "bribe." And the corroboration which he ought to have looked for was some independent evidence implicating the accused in a material particular which corroborated Elbaff's story that the payment was a bribe and not the repayment of small loans as the appellant said. Upon that issue the fact of payment afforded no corroboration at all. Nor was "the false evidence given

Chiedu v I.G.P.
Brown C. J.

by the accused" a corroborative factor. The whole issue before him was whether the appellant's evidence was false. It was in order to enable him to say with certainty that the appellant's evidence was false that he was looking for corroboration of Elbaff's story. And in holding that the appellant's "false evidence" corroborated Elbaff's evidence and confirmed its truth he was begging the question and avoiding the issue.

If the learned Magistrate, having looked for corroboration of Elbaff's story which implicated the appellant in a material particular had found none; and having warned himself, as he did, of the danger of convicting upon the uncorroborated evidence of the accomplice, had nevertheless—with that warning in front of him—expressed himself as so fully satisfied with the truth of Elbaff's story that he decided to convict upon that alone, we would not, in all the circumstances of this case, have taken exception to that decision. Most fully he has set out his reasons for believing Elbaff and disbelieving the appellant. But in holding that two factors were corroborative which in fact were not the learned Magistrate misdirected himself. And if this case ended there we should be in no position to say that if the Magistrate had appreciated that those two factors did not afford corroboration he would still have been so satisfied with the truth of Elbaff's story as to face the danger of convicting upon Elbaff's uncorroborated testimony.

But the case does not end there. In this record there is an exhibit which, in our opinion, received at the trial less attention than its importance deserved. Elbaff produced an undated letter purporting to be signed by the appellant, which is in evidence as Exhibit C. It was suggested that this exhibit was only relevant on the fourth charge, which the prosecution withdrew; and after the fourth charge had been withdrawn no further attention appears to have been paid to it. But we consider that it was also relevant on the first charge, which is the only charge of which the appellant was convicted and which is the subject of this appeal. Elbaff's evidence on the first charge was that the cheque for £5-10*s* was given in order to avoid the hold-up of his lorries by the appellant's refusal to issue permits. In producing Exhibit C. Elbaff said that he found it on his table—"about the month of April" and that—

> "before I got this letter accused has demanded cognac or money for cognac and beer from me on several occasions. I had complied with these demands because I knew that if I refused he could delay the departure of my lorries".

Exhibit C reads as follows:—

"Dear Mr Elbaff,

Good afternoon. How are you today.

What about my COGNAC ?

Your cars came on a Sunday and they are liable to Overtime Fees. They have come up with the news that you are in charge. What about our DEAL ?

What do you say ?

Chiedu".

The letter, according to Elbaff, was received by him "about the end of April". Assuming, as we must, that it was received some time prior to the 5th of May, the "deal" which is referred to in the second paragraph cannot be the deal which resulted in the payment which is the subject of the charge, because according to Elbaff's evidence the interview at which he agreed to pay the £5-10*s* was on the 5th of May, that is the day before the date of the cheque. His evidence was that he gave the cheque to the appellant" on the evening of the following day, at page 6 of the record. The sole issue in this case was whether the appellant accepted the cheque dated May 6th "corruptly", we use the word loosely and not in the technical sense in which it is used in section 98, or innocently in repayment of small loans which he had made to Elbaff. Exhibit C, upon any reasonable construction, shows that upon some date prior to the offence charged the appellant was making a "corrupt" demand in relation to Elbaff's lorries. In our opinion that exhibit is admissible and relevant to the sole issue of whether the payment in this case was "corrupt". In this connection the case of *Rex v. Chesshire, Lucas, and Bottom* 20 Cr. App. R. 47 appears to be directly in point.

In that case two police officers were charged with corruptly accepting a gift, and a third person was charged with corruptly making the gift. A piece of paper was found upon the third person when he was arrested, which contained words alleged by the prosecution to relate to other acts of corruption and by the defence to relate to innocent matters. The trial judge directed the jury that if they believed that the document referred to the previous bribing of policemen and others it was admissible in evidence and they might take it into account. A Court of Criminal Appeal consisting of five judges held by a majority that the document was admissible in evidence as going directly to prove corruption, which was the gist of the case. We would observe that the short head-note to that case does not, in our opinion, bring out the real point and tends to be misleading because of the words "which may refer to the bribery charged". The point was that upon the issue of whether the payment was corrupt or innocent the paper, although it related, or might be construed as relating, to other and previous acts of corruption, was admissible in evidence. We think that the explanation of this case which is to be found at page 1467 of the 33rd edition of Archbold is much clearer than the head-note.

Chiedu v I.G.P.

Brown C. J.

Mr. Ikpeazu, who abandoned the third ground of appeal, while conceding that we are entitled to look at Exhibit C, urged that it would be unfair to do so because at the trial defence counsel did not pursue the matter because he thought that Exhibit C has been abandoned with the fourth charge, and in that belief he was encouraged by the conduct of the prosecution and the learned Magistrate. But we consider that it is our plain duty to take the record as a whole, of which Exhibit C is a part. In the Court below counsel for the appellant neither objected to its going in, nor asked for it to be withdrawn when the fourth charge was abandoned, nor cross-examined Elbaff upon it, nor invited his client to explain it. Nevertheless, in view of the general failure, as it appears to us, to understand the relevance of Exhibit C in the Court below, we drew Mr Ikpeazu's attention to section 55 of the High Court Law. We would not have thought it right to make use of that section on our own initiative, but we indicated that if he desired that it should be used to remedy the omissions of the appellant's counsel in the Court below we would be prepared to hear him upon any application he might wish to make. Exhibit C remains upon the record unchallenged and unexplained.

In the result we are of the opinion that, while the learned Magistrate misdirected himself upon the matter of the corroboration of Elbaff's evidence, no miscarriage of justice has occurred because if he had appreciated the significance of all the other evidence in the case he could have come to no other finding than that the appellant was guilty of the charge of which he was convicted.

The appeal is dismissed.

Appeal dismissed.

SIMEON GLADSON UZO CHIEDU *v* INSPECTOR-GENERAL OF POLICE

[Federal Supreme Court (Foster-Sutton F. C. J., Verity A. F. J. and Irwin A. F. J.) June 22, 1956)
[Criminal Appeal No. F.S.C. 47/1956]

Foster Sutton, F. C. J. (delivering the judgment of the Court): The only point raised on this appeal is the question whether or not the High Court, on appeal, were right in treating the letter admittedly written by the appellant Exhibit "C", as corroboration of the complainant's story. To borrow the language used by Lord Hewart L. C. J. in *Rex v Chesshire, Lucas and Bottom* 20 Cr. App. R., at page 51: "In this case corruption was one of the issues throughout"; and the letter in question, in our view, went directly to prove corruption. That concludes the matter. This appeal is accordingly dismissed.

Appeal dismissed.

SAIDU AHMED DAURA *v* INSPECTOR-GENERAL OF POLICE

[C. A. (Bairamian, Ag. C. J., and Smith, J.) July 4, 1956]
[Kano—Criminal Appeal No. K/23A/1956]

Criminal Law—Criminal Code, s.161: stopping mails

The appellant, a postal agent, retained a letter he found in the Post Office letter box, and stole its contents. He was convicted of stopping a mail with intent to rob postal matter under s.161 of the Code. "Mail" is defined as follows in s.1 of the Code:

> "'Mail' includes any conveyance of any kind by which postal matter is carried, and also any vessel employed by or under the Posts and Telegraphs Department, or the postal authority of any other country, or the Admiralty, for the conveyance of postal matter, under contract or not, and also a ship of war or other vessel in the service of Her Majesty in respect of letters conveyed by it and also a person or animal used for the conveyance or delivery of postal matter."

Held:

> The retaining of a letter found in a letter box is not an offence within the meaning of section 161 of the Code.

(*Note*.—only that part of the judgment which deals with this point is published. The appellant was also convicted of stealing, and this was affirmed.)

CRIMINAL APPEAL.

Shyngle for the appellant.

Nasir, Crown Counsel, for the respondent.

Bairamian, Ag. C. J. (delivering the judgment of the Court): The appellant was convicted on three counts: (1) that he stole six postal orders worth £4, the property of one Godwin Nwosu, (2) that he stole £4, the property of Godwin Nwosu, (3) that he stopped a mail with intent to rob postal matters, to wit a letter posted at Daura to one Frank M. Nwosu of Umuahia, an offence under s.161 of the Criminal Code.

Section 161 provides that—

Any person who stops a mail with intent to search or rob postal matter is guilty of a felony, and is liable to imprisonment for life.

The definition of mail in section 1 of the Code makes it clear that it means a conveyance by which postal matter is carried, or it may mean an animal used for carrying letters or even a man who may be carrying the post from one place to another. In the present case the appellant, according to the view of the prosecution and of the learned Magistrate, did no more than retain the letter containing the postal orders when he, as the postal agent at Daura, opened the box, instead of sending it on. That does not come within section 161 of the Code: the Post Office box into which one drops letters is not a conveyance; consequently the conviction on count 3 is quashed.

Appeal dismissed.

EMMANUEL SERIKI *v* INSPECTOR-GENERAL OF POLICE

[C. A. (Bairamian, Ag. C. J., and Smith, J.) July 4, 1956]

[Kano—Criminal Appeal No. JD/34A/1956 of Jos]

Police Ordinance, s. 64—Pretending to be a police officer—Purpose—Wording of charge.

The appellant pretended to be a police officer so as to get the use of a motor car to go somewhere. He was prosecuted under s. 64 of the Police Ordinance (on personation of police officer: text in the judgment).

The charge spoke of him of "not being a person employed in the public service", instead of (in the words of the section) "not being a police officer".

Held: The point in the section is that one pretends to be a police officer for the purpose of clothing himself with the authority of doing something which he has not the authority to do; there was no particular virtue in pretending to be a police officer for the purpose of getting a motor car to go somewhere.

Obiter: the words "not being a person employed in the public service" vitiated the charge.

CRIMINAL APPEAL

Appellant in person.

Nasir, Crown Counsel, for the respondent.

Bairamian, Ag. C. J. (delivering the judgment of the Court): This appeal was allowed yesterday, and the reasons are being given now. The charge was in these terms:

> "That you Emmanuel Seriki Salako on the 12th day of July, 1955 at Kabba in the Kano Magisterial District, not being a person employed in the public service, pretended to be a Police Officer to wit: a C.I.D. Inspector for the purpose of doing an act or acts which he would not have been able to do on his own authority and thereby committed an offence punishable under section 64 of the Police Ordinance."

The said section 64 reads as follows:

> "Every person not being a police officer who puts on or assumes, either in whole or in part, the dress, name, designation, or description of any police officer, or any dress, name or designation, resembling and intended to resemble the dress, name or designation of any police officer, or in any way pretends to be a police officer, for the purpose of obtaining admission into any house or other

place or of doing any act which such person would not by law be entitled to do of his own authority, shall be guilty of an offence, and, on summary conviction thereof before a magistrate, shall be liable to a penalty of one-hundred pounds or to imprisonment for a term of one year. (62)"

We pause for a moment to point out that it was a mistake to write in the charge the words "not being a person employed in the public service"; the proper words to write were "not being a police officer" in accordance with the opening line of section 64.

The other mistake was to say in the charge merely "for the purpose of doing an act or acts which he would not have been able to do on his own authority". That is vague: it does not tell the defendant what the act or acts were which he wished to achieve by pretending to be a police officer; the act or acts ought to have been specified.

There are no reasons for the finding. The record reads:

"Oral judgment given. I find the accused guilty." Presumably the learned Magistrate accepted the following evidence: that the appellant introduced himself to a corporal as a C.I.D. Police Inspector from Kaduna and said that he had come on special duty at Kabba, but, as the District Officer was not in, he was going to Lokoja to see the Assistant Superintendent of Police; that the corporal went with him to the house of a man who had a car, and there the appellant told that man that he had been sent from the C.I.D. Headquarters, Kaduna, for a matter at Lokoja, for which he wanted to use that man's car so as to go to Lokoja to get the Police car; that that man gave him his car believing that the appellant was truthful. We do not think that pretending to be a police officer for the purpose of obtaining the use of a car is the sort of act contemplated in section 64 of the Police Ordinance. The wording is "in any way pretends to be a police officer for the purpose of obtaining admission into any house or other place, or of doing any act which such person would not by law be entitled to do of his own authority." The point is that the defendant pretends to be a policeman for the purpose of clothing himself with the authority of doing something which he has not the authority to do. For obtaining the free use of a car the appellant might equally have pretended to be a judge or a resident or an assistant district officer or a magistrate, or anything of importance which might have induced the owner of the car to let him have it; there was no particular virtue in pretending to be a police officer for that purpose; the act of using a car is not peculiar to police officers, nor are police officers privileged by law to obtain cars for their use or to obtain them on terms differing from those on which others can obtain them, at any rate in normal circumstances.

Seriki v I.G.P.

Bairamian Ag. C.J.

We therefore thought that the conviction could not be sustained on that account and allowed the appeal. Incidentally, the charge was faulty, as we said; we are inclined to think that the words "not being a person employed in the public service" vitiated the charge: the allegation ought to have been "not being a police officer".

Appeal allowed.

ALHAJI AMADU JOHN HOLT *v* MOMODU OKAH IDAH

[C.A. (Bairamian, Ag. C.J., and Smith, J.) 6th July, 1956]
(Assessors: M. Muhammadu Bello, Walin Katsina, and M. Dan Masani, Muftin Majalisa)
[Kano—Appeal No. K/87A/1955]

Civil Appeals from Native Courts—Approach of High Court—High Court Law, section 62.

Native Law and Custom—Transactions between natives—High Court Law, section 34*—High Court trials.*

Native Law and Custom—Maliki Law—Sale—Allegation of sale with option—Onus of proof—Article with defect discovered after purchase —Right to relief—Loss of right by use after discovery of defect.

Native Courts—Maliki Law—Practice and procedure—Order before judgment to pay money into court and of sale in default—Payment out of money after leave to appeal.

Jurisdiction—Suit in competent Native Court—Subsequent suit in High Court on same matter—Impropriety.

In the Native Court the plaintiff sued claiming the return of money he had paid on account upon buying a lorry, alleging an option to return it if it was not good and that it broke down on both the trips made after purchase. The defendant denied the option and added that the paintiff undertook to pay by instalments for the balance, and that long afterwards the plaintiff said his relative spoilt the lorry, whereupon he, the defendant, claimed the balance. The plaintiff's relative did not confirm him.

The trial court wrote for the lorry to be sold where it was, and in the meantime ordered the defendant to pay what he had received into court and in default ordered his house to be sold. Later an answer came that no one wanted to buy the lorry. The court stated that as the motor appeared to be a spoilt one, the law revoked the sale, and ordered the defendant to refund the money. This he paid into court, and the court ordered the money to be kept and gave leave to appeal, but shortly after paid the money out to the plaintiff.

When the Native Court ordered the sale of his house, the defendant brought an action in the High Court claiming the balance of the price; his solicitor did not mention the suit pending in the Native Court. After judgment in the Native Court the defendant appealed.

Holt v Idah

Bairamian Ag. C.J.

Held with the advice of the Assessors:

(1) The plaintiff had the duty to prove the option to return the lorry, but he failed to prove it.

(2) A purchaser has a right to relief if the article suffered from a defect which is discovered after the sale; but if after discovering the defect he uses the article, his right is gone.

(3) Upon the evidence and having regard to Maliki Law, the trial court ought to have ordered the plaintiff to pay the balance of the price.

(4) The order on the defendant to pay money into court and to have his house sold in default, before judgment on the dispute, was unjustified.

(5) After leave to appeal the money paid into court ought not to have been paid out without waiting for the time for bringing an appeal to lapse and ascertaining that an appeal had not been brought.

Per Curiam:

(*a*) The High Court would approach an appeal from a Native Court in the light of the customary law applied in the court appealed from—which in this case was Maliki Law—and be governed by section 62 of the High Court Law.

(*b*) If there is a case before a Native Court of appropriate jurisdiction, another suit on the same subject matter ought not to be brought in the High Court.

Obiter:

The High Court hearing a case at first instance would, pursuant to section 34 of the High Court Law, apply native law and custom in a transaction between natives (as was the transaction in the present case).

CIVIL APPEAL FROM A NATIVE COURT.

Lewis Thomas for the appellant.

No appearance for the respondent.

Bairamian, Ag. C. J. (delivering the judgment of the Court):

This is an appeal in a civil case decided by the Chief Alkali of Kano, in which the plaintiff complained about a lorry he had bought from the defendant.

In substance the plaintiff's case was that they agreed on his paying the money and, if the lorry was not good, the defendant would return the money; whereupon the plaintiff paid £400 on account; that when

the lorry was repaired and ready to run, he, the plaintiff, said they would not take it because it was old, and that defendant then said they should go and use it and, if it was not good, he would refund them their money; after which they made two trips to Katsina and the lorry broke down on each trip; they got some money from these trips which they paid to the defendant asking him to give them back their money; but he said the driver was not good and instructed them (the plaintiff and Shaibu) to go to Gusau; there the plaintiff fell ill, and Shaibu took the lorry and went away; when the plaintiff recovered, he came back to Kano and informed the defendant about it and the defendant said he should go and complain against the man who had charge of the lorry when it got spoilt.

The defendant's version was in effect that when the battery was put in and the engine was started, the plaintiff said the lorry was good and he would buy it, and then they went and had it licensed, and the plaintiff went off with the lorry upon an agreement that they would pay the balance by monthly instalments; they brought him £10 once and £7 the second time, and went off with the lorry to Gusau. and two months later the plaintiff came back and said he was not well, that Shaibu had taken the lorry to Jega and spoilt it and the engine got broken; whereupon he asked for the balance of £250, and the plaintiff said he would sell his motors and pay.

The issue of fact was whether the defendant agreed to refund the money he had received on account if the lorry was not good, and it was the plaintiff's duty to prove it. Shaibu, a relative of his, made a statement from which it appears that the plaintiff hesitated to buy the lorry without knowing about the condition of the engine, and Shaibu told him in their native tongue (which suggests that it was a language the defendant did not know) that he did not think the defendant would deceive them. "Let us give him the money: if the motor is found to be good praise be to God, and if it is not found to be good then he will return our money." Later, when the engine was started, the plaintiff said he liked it, and the defendant lent them money to license it, and they took it away. They made two trips and paid the defendant £17; this did not please the defendant, who told Shaibu to go with them (that is, presumably, the plaintiff and the driver) so as to get him his balance. They went to Gusau, where the plaintiff, who fell ill, instructed Shaibu to ply between Sokoto and Jega, but when they returned the engine burst up; and when he informed the plaintiff, the plaintiff told him to ask the defendant to buy them a new engine until they could pay him his money.

The Chief Alkali then decided to write to the Alkali at Sokoto to sell the lorry for what it would fetch, and after that he would proceed with the case. A week later the Chief Alkali asked the defendant to pay into court the money he had received, and ordered the sale of the

Holt v Idah

Bairamian Ag. C.J.

defendant's house. Nearly a month later a letter came from Sokoto that nobody wanted to buy the lorry. The Chief Alkali stated that, as this motor appeared to be a spoilt one, the law revoked the sale of the lorry and ordered the defendant to refund £360.

We are mindful of the fact that in hearing an appeal from a native court we are governed by section 62 of the High Court Law of the Northern Region; it provides that—

> "62. Where the jurisdiction conferred on any native court is, as regards law, practice or procedure, regulated in any particular by native law and custom, no objection to any proceeding in such court shall be taken or allowed on the hearing of an appeal from a decision of such court on the ground only that, in any such particular, there has been a failure to observe any principle of English law or any English rule of evidence or procedure, if such proceeding or decision is not in fact contrary to natural justice, morality, equity or good conscience nor incompatible with the provisions of any written law."

We therefore propose to view the case in the light of Maliki law, which is the law applied by the Chief Alkali. Incidentally, had this case been tried at first instance, it being a transaction between natives, native law and custom would have been applied to it pursuant to section 34 of the High Court Law. What follows on Maliki law is written with the advice of the learned Assessors sitting with us.

As stated already, it was the duty of the plaintiff, who bought the lorry, to prove that the purchase was subject to trial of the lorry and an option in his favour to return it, if he did not like it. To prove that the plaintiff had to call evidence to confirm him; but Shaibu did not confirm the allegation of the plaintiff. Therefore it is a little difficult to understand why the Chief Alkali ordered the lorry to be sold, or why he decided that the law revoked the sale because there was no purchaser for the lorry at Sokoto.

It seems to us that the Chief Alkali was perhaps actuated by considerations of what may be called a purchaser's right to relief where it turns out that the article he bought suffered from a defect which is discovered after the sale. In such a case the purchaser may apply to the Qadi, who will have the article examined by those who know about it—by experts so to speak—and if the fault affects the value by a third or more, the sale may be revoked, or, if the fault affects the value by less than a third, then the purchase price will be reduced accordingly. The point, however, to bear in mind is this: that the purchaser must act promptly and must not use the article any more once he has discovered the defect, or else he is deemed to approve the sale notwithstanding the defect and loses his right to any relief on that account.

The plaintiff himself told the court below that they went to Katsina twice with the lorry and on each trip the lorry broke down on the way. If he had wished to claim relief on the ground of defect, he should have stopped using the lorry after the first trip and complained to the court at once. He did not do so; on the contrary, they made a second trip. Moreover, even after the second trip, he sent off the lorry from Gusau with Shaibu. He had no case for relief left.

Incidentally, Shaibu does not confirm the plaintiff that the lorry did not work well on either of the trips to Katsina. It was, says Shaibu, after the trip between Sokoto and Jega that the engine of the lorry got broken.

From whichever angle—whether the burden of proof, or the evidence in the case, or the law of sale—one looks at this case, the decision that the sale was revoked in law was wrong and the order on the seller to refund erroneous. The Chief Alkali knew there was an outstanding balance, and the right order for him to have made was that the buyer, the plaintiff, should pay that balance to the seller, the defendant.

The defendant behaved not too well in this case. On the 14th September, the Chief Alkali said that the defendant ought to pay the money into court to be kept there, until a reply was received from the Alkali of Sokoto; and, as the defendant said he had no money, the Chief Alkali put his house into the hands of the ward-head to sell before an answer came from Sokoto.

We pause here to say that this action of the Chief Alkali was entirely unjustified at that stage: for he had not given judgment against the defendant that the sale was revoked by law until the 11th of October.

It seems that that order to sell his house prompted the defendant to consult a solicitor, who, instead of appealing against the order to sell the house, filed a suit on 5th October in the High Court claiming against the buyer of his lorry a balance of £275. We confine ourselves to saying here that it was highly regrettable that such an action was brought at all: for the question raised thereby was the question in the case pending before the Chief Alkali. If the Chief Alkali decided against the seller of the lorry, that decision could only be reversed on appeal; the High Court Judge at first instance could not have ignored the decision of the Chief Alkali. We cannot stress too strongly that where there is a case before a native court of appropriate jurisdiction, another case on the same subject matter ought not to be brought in the High Court.

Holt v. Idah — Usiramian Ag. C.J.

What was worse, in the suit filed in the High Court no mention is made of the case still unfinished in the court of the Chief Alkali. The appeal from the Chief Alkali was lodged on the 9th November, 1955 by the same solicitor as had filed the suit in the High Court on 5 October. As late as the 1st December the solicitor, who swore an affidavit with a view to an order for substituted service on the buyer of the lorry, said nothing in it about the appeal from the Chief Alkali. Smith, J. it was who happened to remember seeing in the appeal papers, the names of the parties in the suit and mentioned the fact to the solicitor. The case may require further consideration, and a copy of this judgement will be sent to the Attorney-General.

The other point we wish to mention is this: on the 11th October, 1955, the Chief Alkali told the seller (now the appellant) to pay in £360, which he did on the 14th; then the note reads "The Alkali ordered the money to be kept in court and open the way for Ahmadu"; which means he was giving leave to Ahmadu to appeal; and this is the next note: "On 16-10-55 Moh. came and the Alkali handed the £360 to him and he paid the ushiri (one-tenth of the amount recovered from a debtor) £36. A receipt No. 399554 was given to him. Then Mohammadu said there remained the balance of £30. The Alkali said until the matter before the Chief Justice has been decided." (meaning that the £30 point should wait until, etc.).

Plainly the Chief Alkali knew from the appellant there was a matter to come in the High Court relating to his decision. He ought not to have paid the money to the other side but should have asked the appellant to bring him a certificate, within the 30 days allowed for appeal, that he had appealed, and thereafter retained the money in his court until the appeal was decided. When the money payable under a judgment is paid into court, the man who obtained the judgement runs no risk; on the other hand the man who pays in the money runs the risk of not being able to recover his money if he wins on appeal. Execution should normally be stayed when money is paid into court pending appeal.

The order we make is that the decision of the Chief Alkali is set aside and the respondent is ordered to pay the appellant £660 plus out-of-pocket costs only at £2-2s-0*d*. We think that the appellant ought not to have any solicitor's costs in the circumstances of this case.

Appeal allowed.

SAMUEL TORHAMBA v. INSPECTOR-GENERAL OF POLICE

[C. A. (Bairamian, Ag. C. J., and Hurley, J.) July 14, 1956]
[Jos—Criminal Appeal No. 35A/1956]

Police Ordinance, s. 64—Pretending to be a police officer—Purpose of the Criminal Law—Criminal Code, s. 430(1): having possession of thing reasonably suspected of having been stolen (unlawful possession)—Cases designed for; cases not contemplated—Evidence and finding required.

Criminal Law—Conviction for lesser offence—Criminal Procedure Ordinance, s. 179—Lesser offence contemplated.

"Section 430(1) cannot be used either as a substitute for a prosecution for stealing or receiving which has not been proved, as decided in the case of *Ayanshina*, or as a substitute for a case of stealing which has been proved, as shown in this appeal, but can only be successfully used in the precise circumstances contemplated by the wording of the section." (From the judgment, *ad fin.*)

The appellant had been a member of the Police Force and had an Identity Card given him bearing his photograph (taken at Police expense). When suspended he was asked for the Identity Card but said he had lost it. Later he was discharged from the Force.

The appellant showed his Identity Card at a railway station and by pretending to be a policeman obtained a free pass; he was suspected and arrested. Later he was also charged with unlawful possession of a Police Identity Card under s. 430(1) of the Criminal Code which relates to possession of goods reasonably suspected of having been stolen or unlawfully obtained.

He was prosecuted for (1) an offence under s. 64 of the Police Ordinance, which relates to personation of police officers, and (2) an offence under s. 430(1) of the Code. As regards (2): the evidence was not directed to proving an offence under s. 430(1) but to proving that he had stolen the Police Identity Card; and the Magistrate's finding was to the effect that he had stolen it. He was convicted. Crown Counsel did not support the conviction under s. 64 of the Police Ordinance. As regards the conviction under s. 430(1) of the Criminal Code he argued that the finding that the Identity Card had been stolen included within itself a finding that it was reasonably suspected of having been stolen, and that under a charge of stealing it was possible to convict of an offence under s.430 (1) of the Criminal Code.

Torhamba v. I.G.P. — Bairamian Ag. C.J.

Held: Pretending to be a police officer for the purpose of obtaining a free railway pass is not an offence within the meaning of s. 64 of the Police Ordinance.

Held also: Section 430 (1) of the Criminal Code cannot be used as a substitute for a case of stealing which has been proved: stealing differs in its nature and elements from an offence under s. 430(1), therefore a finding of stealing does not include within itself a finding of an offence under s. 430(1), nor it is possible, in view of the restricted class of lesser offence contemplated in s.179 of the Criminal Procedure Ordinance, to convict of an offence under s. 430(1) of the Criminal Code on a charge of stealing.

Obiter: S. 430(1) of the Code applies to cases where the goods are reasonably suspected of having been stolen or unlawfully obtained but it is difficult to prove the ownership of the goods and thus impossible to prove that they were actually stolen.

Cases cited:

(1) *Seriki v I.G.P.*, 1956 N.R.L.R., p. 78 followed ;

(2) *Oguntolu v Police*, XX N.L.R., 128 followed ;

(3) *Flatman v Light* (1946) 2 A E.R., at p. 369 followed ;

(4) *Ayanshina v Commissioner of Police*, W.A.C.A., on 3rd October 1951 followed ;

(5) *Boulos v The Queen*, 14 W.A.C.A., at p. 544 referred to ;

(6) *Hadley v Perks* (1866) vol. 1 of the Queen's Bench Cases, at p. 458 approved ;

(7) *Reg. v Adokwu and others*, XX N.L.R., 103;

(8) *Cooray v The Queen* (1953) 2 W.L.R. 965.

CRIMINAL APPEAL:

Anionwu for the appellant.

Henderson, Crown Counsel, for the respondent.

Bairamian, Ag. C. J. (delivering the judgment of the Court):

The appellant was convicted of two offences—one under section 64 of the Police Ordinance, which relates to personating a police officer, and the other under section 430(1) of the Criminal Code which relates to possession of goods reasonably suspected of having been stolen or unlawfully obtained.

The evidence was that he produced a police identity card bearing his photograph to a station-master and by pretending to be in the Police Force obtained a railway pass to travel. He had in fact been discharged from the Force. It has already been explained in *Seriki v I. G. P.* (*supra*) that the point in section 64 of the Police Ordinance is that a person pretends to be a police officer for the purpose of clothing himself with the authority of doing something which he has not the authority to do. Obtaining a free railway pass is not peculiar to police officers; the appellant might as well have pretended to be a court clerk for that purpose. The conviction was wrong.

As regards the second count, the evidence was that when the appellant was suspended, he was asked to give up his identity card along with the rest of his police kit, but he said he had lost it. He denied this before the Magistrate and said that he thought he was entitled to keep it as it had his photograph on it; but he admitted that it was not he who paid for the photograph to be taken. The learned Magistrate did not believe him, and convicted him of an offence under section 430(1) of the Code.

The subsection reads as follows:—

> Every person who is charged before any court with having in his possession or under his control in any manner or in any place, or for that he at any time within the three months immediately preceding the making of the complaint did have in his possession or under his control in any manner or in any place, anything which is reasonably suspected of having been stolen or unlawfully obtained and who does not give an account, to the satisfaction of the court, as to how he came by the same, is guilty of an offence and is liable, on conviction, to a fine of one-hundred pounds or to imprisonment for six months.

Mr. Anionwu has pointed to the fact that the appellant did not obtain the identity card unlawfully: it was given him; and he has argued that the subsection did not apply. The wording is "which is reasonably suspected of having been stolen or unlawfully obtained". There is the word "stolen" besides the word "obtained". Under the Criminal Code it is possible to obtain a thing lawfully and steal it afterwards by converting it fraudulently to one's own use.

The Magistrate wrote this in his judgment:

> "I find as a fact that he (the appellant) produced the identity card exhibit C, which should not have been in his possession. I find he told lies about that card even when he was in Kano. P.W. 5 reports how accused did not hand in the card when asked

Torhamba v. I.G.P.

Bairamian Ag. C.J.

for it, saying he had lost it at Minna. The card bears the stamp of the Nigeria Police Kano dated 19th November, 1954, so obviously accused had it at Kano. The inference is that he decided to keep it when leaving the Force."

This was a plain finding that the appellant stole the identity card which was the property of the Police. Mr. Anionwu has therefore relied on *Oguntolu v Police*, XX N.L.R., 128, which decided that section 430(1) of the Code did not apply where there was evidence of stealing and the owner was traced.

That decision relied partly on the view taken in Cyprus and in Trinidad on similar provisions and partly on a passage in Lord Goddard judgment in *Flatman v Light* (1946) 2 A.E.R. at p. 369.

Mr. Henderson has argued that the decision went too far. He drew attention to this sentence in Lord Goddard's judgment :

> "If the police, or whoever start the prosecution, are satisfied that it was stolen, and could show it was stolen, there is no need to invoke the section (namely section 24 of the Metropolitan Police Courts Act, 1839, from which our 430(1) is derived);"

and he has argued that that does not mean that the section cannot be invoked if the police are satisfied that it was stolen and could show it was stolen.

Lord Goddard was dealing with a question of *autrefois acquit*; he was not dealing with the question whether the section could or could not be invoked in the circumstances he stated. His judgment was used as support in regard to the mischief aimed at by the provision. His Lordship went on to say:

> "The section is designed to cover cases where it is impossible to show at the time of the man's arrest that the property is stolen. It is not necessary to show that it is stolen, because the section deals with property which is "reasonably suspected of being stolen or unlawfully obtained"."

What happened in *Flatman v Light* was that the accused were first charged under the said section 24, but later, when information of who the owners of the fowls were and that they were stolen was received, then that charge was given up and a new charge of larceny was put in. That was a proper course of pursue. The question is whether it is possible, upon evidence of ownership and stealing, still to carry on successfully with a prosecution under section 430(1).

It was said in *Boulos v The Queen*, 14 W.A.C.A., at p. 544, last para. (decided on 28 May, 1954) that—

"The subsection under which the appellant was charged is wide in its scope, and I agree with the view expressed by this Court in the case of *James Ayanshina v Commissioner of Police* (decided on 3rd October, 1951) 'that it can only, if it is not to impose hardship on innocent persons, be applied with the greatest caution and in the circumstances in which we feel the Legislature intended that it should be operated', etc."

What happened in the case of *Ayanshina* was this: He was charged with receiving stolen goods and his co-defendant was charged with stealing them; the Magistrate ruled that there was no case to answer and acquitted them both on those charges, but added a charge under section 430(1) of unlawful possession, on which Ayanshina was convicted. The Court of Appeal said this in the judgment:

"The basis of that charge is that the accused person should be found in possession of goods reasonably suspected of having been stolen or otherwise unlawfully obtained and the whole basis of the charge is the reasonableness of the suspicion. In this case what was suspected by the prosecution in the first instance was that the appellant's co-defendant had stolen the goods and that the appelant had received them knowing them to be stolen. That was the basis of the reasonable suspicion the subject matter of this additional charge. By acquitting the co-defendant of that theft and by finding that the appellant had no case to answer regarding the charge of receiving the basis of the suspicion which the prosecution held in the first place had been disposed of. What then could be the basis of any suspicion against the appellant? Merely this, that he was found in possession of certain pieces of iron roofing which may have at one time been the property of persons from whom the co-defendant was charged with stealing them, but there was nothing to indicate how long this property had been out of possession of its original owner or what circumstances aroused suspicion in regard to his possession of them. Section 430 sub-section (1) of the Criminal Code is a very wide and far reaching section. It can only, if it is not to impose hardship on innocent persons, be applied with the greatest caution and in the circumstances in which we feel the legislature intended that it should be operated. We cannot think that it is the intention of the section that it may be used as a substitute for a prosecution for larceny or receiving which has not been proved. It is based as I have said upon the existence at the time the charge is made against the defendant of reasonable grounds for suspecting that the goods were unlawfully obtained and only I think in the precise circumstances which may be deduced from the wording of the section can it be used. In the present case we do not think that the circumstances are such that the charge was properly brought."

Torhamba v. I.G.P. Bairamian Ag. C.J.

The judgment makes it clear that the use of the section is restricted: "it is based.....upon the existence at the time the charge is made against the defendant of reasonable grounds for suspecting that the goods were unlawfully obtained"; which makes it incumbent on the prosecution to show by evidence that at the time the charge is made there are reasonable grounds for suspecting that the goods were stolen or unlwfully obtained, and there must be a finding that there was such evidence, in order to show that the case arose, in the words of the judgment quoted, "in the precise circumstances which may be deduced from the wording of the section".

The railway station-master who gave a free pass to the appellant said this:

> "The train had gone when you came to me and said you could not travel. You came to my office to report. I saw you outside and called the N.C.O. to identify you. When he could not do so, I was suspicious."

His suspicion was that the appellant was not a member of the Police Force and that was why he handed the appellant over to the Police. The next witness, Corporal Omanchi, "told the N.A. Police to verify by telegram whether accused was still in the force"; and he also said this:

> "I remember P.W. 1 (the railway station-master) asking you questions about the Identity Card and matters showing on it. You answered them all satisfactorily."

It was Corporal Ogiri who next day at the Charge Office "re-arrested" the appellant and charged him not only with personating a police officer but also with unlawful possession of a Police identity card, but he does not say why. The next witness did not give any evidence directed to the charge under section 430 (1). The other witness in the case was one Ewa, a policeman from Kano, who gave evidence of how he asked the appellant to hand in his identity card when suspended and of the latter's saying that he had lost it, which was evidence directed to show that the appellant had stolen the card. The prosecution were really presenting a case of stealing and the finding was to that effect. Whether such a finding can sustain a conviction of unlawful possession is a point which will be dealt with later. Here it may be useful to cite authority on what cases sub-section 430 (1) was designed to cover. What cases it was designed to cover we know from Lord Goddard's statement in *Flatman v Light* already cited; and we have another statement from Blackburn, J., in *Hadley v Perks* (1866) volume 1 of the Queen's Bench Cases, at page 458, where the learned Judge said this: (his lordship was dealing with the section 24 already referred to and a section 66 in a Police Act enabling the arrest of persons in certain circumstances):

"But the mischief intended to be met by sections 66 and 24 was evidently that of suspected goods being carried along the streets; as where there is a bag of coffee,for instance, found on a man, and there is reason to believe that it has been pilfered from some ship or warehouse, but from which particular ship or warehouse it is difficult to prove. If a man is found carrying anything of this kind along the street, there is summary power to arrest him, and to punish him; but I think in the case of the search warrant there must be an information on oath that the goods have actually been stolen or unlawfully obtained."

The local section, originally like the English section 24, was later enlarged to cover cases other than those of carrying in the streets, but the mischief aimed at still remains the same. It applies to cases where the goods are reasonably suspected of having been stolen or unlawfully obtained but it is difficult to prove the ownership of the goods and thus impossible to prove that they were actually stolen.

In the present case the learned Magistrate made a finding of stealing; and Mr. Henderson has argued that that finding includes within itself a finding that the identity card is reasonably suspected of being stolen: it is possible, according to his argument, under a charge of stealing, or under a finding of stealing, to convict of an offence under section 430 (1).

With all respect to learned Crown Counsel, his propositions cannot be supported by authority. In *Flatman v. Light* Lord Goddard said (at p. 370) "the charge of larceny is a case of an entirely different nature from the one before the magistrates (viz. of unlawful possession)"; and Humphreys, J., said (at p. 371) that they did not consist of the same elements. If they are of a different nature and do not consist of the same elements, it follows that a finding of larceny or a charge of larceny does not include within it a finding or a charge of unlawful possession.

That may perhaps be said also to dispose of the argument that under a charge of stealing a person may be convicted of unlawful possession; but this is a startling proposition which deserves special discussion.

There is no specific provision to that effect in the Criminal Procedure Ordinance among the sections numbered 169 to 178, and if it is at all possible, then it must be so by virtue of section 179 thereof, which provides that—

"(1) In addition to the provisions hereinbefore specifically made whenever a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete lesser offence in itself and such combination is proved

Torhamba v. I.G.P.

Bairamian Ag. C.J.

but the remaining particulars are not proved he may be convicted of such lesser offence or may plead guilty thereto although he was not charged with it.

(2) Whenever a person is charged with an offence and facts are proved which reduce it to a lesser offence he may be convicted of the lesser offence although he was not charged with it."

There is a decision on the meaning of those provisions in *Reg v. Adokwu and others*, XX N.L.R., 103, but it seems that the point has not been made clear, and a fresh effort will be made here to interpret sub-s. (1). The important words are "Whenever a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete lesser offence in itself". Thus the lesser offence is a combination of some of the several particulars making up the offence charged: in other words the particulars constituting the lesser offence are carved out of the particulars of the offence charged. For example if the charge is wounding with intent to do grievous harm, the lesser offence is unlawful wounding; and if unlawful wounding is proved but not the intent to do grievous harm, the defendant may be convicted of unlawful wounding. Again, if a person is charged with murder, he may be convicted of manslaughter: for murder is unlawful killing with malice and manslaughter is unlawful killing merely, or it may be murder reduced to manslaughter by provocation, which furnishes an example under sub-s. (2). When one is considering action under s.179, one should write out the particulars of which the offence charged consists and see whether it is possible to delete some words out of those particulars and have a residue of particulars making up the lesser offence of which it is proposed to convict. It is the test required by section 179; it will be found that it means deleting a particular of aggravation, as in the examples given. An authoritative example is furnished by the case of *Cooray v. The Queen* (1953) 2 W.L.R. 965 (1953) A.C. 407. Cooray was convicted of the offence of criminal breach of trust by an agent, an offence in Ceylon punishable up to ten years; he did commit criminal breach of trust but he was not an agent within the meaning of the relevant section; therefore the Privy Council substituted a conviction of the lesser offence of a simple criminal breach of trust, which is punishable up to three years. The provisions in Ceylon are similar to those we have in our section 179. We adopt what was said in *Reg. v. Adokwu* as correct and hope that with what has been added now the meaning and use of section 179 will be clear.

The definition of stealing is as follows: s.383 (1) of the Code:

"A person who fraudulently takes anything capable of being stolen, (which is explained in section 382 and imports an owner), or fraudulently converts to his own use, or to the use of any other person any thing capable of being stolen is said to steal that thing."

A charge of stealing is in the following form, as given at p. 384 of vol. 2 of the Laws of Nigeria (1948):

Particulars of Offence: A.B., on the day of 19 , in the province of , stole a bag, the property of C.D.

By what method of deleting a particular in the offence of stealing can one produce the offence of being in possession of something which is reasonably suspected of having been stolen or unlawfully obtained in regard to which the defendant is not able to give an account to the satisfaction of the Court as to how he came by the same, which is the offence in section 430 (1) of the Code ? It should be obvious that it is not possible to convict of an offence under section 430 (1) when the charge is stealing. The elements of the two offences are different: *Flatman v Light.*

What has happened in this case is that the learned Magistrate made findings of fact to the effect that the appellant stole an identity card the property of the Police, and convicted the appellant of the totally different offence in section 430 (1) of the Code. The conviction cannot be sustained by those findings of fact and must be set aside.

This has been a rather long judgment, and it may be useful if we recapitulate here that section 430 (1) cannot be used either as a substitute for a prosecution for stealing or receiving which has not been proved, as decided in the case of *Ayanshina,* or as a substitute for a case of stealing which has been proved, as shown in this appeal, but can only be successfully used in the precise circumstances contemplated by the wording of the section.

The appeal is allowed on both counts.

Appeal allowed.

SAMUEL ONUOHA *v.* INSPECTOR-GENERAL OF POLICE

[C. A. (Bairamian, Ag. C.J., and Reed, Ag. J.) 23 July, 1956]
[Kaduna—Criminal Appeal No. Z/13A/56]

Criminal Appeals from Magistrates—Appeal from conviction—Record of plea of guilty—Whether and when appeal lies—Magistrates' Courts Law, sections 85 *and* 97*—High Court Law, section* 47(*c*).

Criminal Law and Procedure—Need to explain charge—Criminal Procedure Ordinance, s. 215.

The appellant was charged with stealing money, and the record showed a plea of guilty. He appealed on the ground that he "did not intend to plead guilty and did not believe he had pleaded guilty" and filed an affidavit in support. For the respondent it was objected that section 97 of the Magistrates' Courts Law did not include such a ground. The Court referred to paragraph (*j*) of s. 97, to s. 85 of that Law, and to s. 47 (*c*) of the High Court Law; and the Court thereafter heard evidence on the plea made, from which it appeared that the appellant admitted taking a sum of money, which the Magistrate recorded as a plea of guilty, without enquiring of him whether he meant to keep the money as his own. (The relevant provisions are quoted in the judgment).

Held: If a defendant who did not admit the charge is convicted without a trial, there is a miscarriage of justice within the meaning of section 47 (*c*) of the High Court Law, which entitles him to appeal against conviction on the ground that he did not intend to plead guilty; and his appeal will be allowed if it appears, as it did in this case, that the recording of a plea of guilty was a mistake.

Obiter: Section 97 (*j*) of the Magistrates' Courts Law may be said to cover that ground of appeal.

Per curiam: Where a defendant in answer to the charge admits a fact, he should be asked questions on the ingredients of the offence so as to make sure that he is admitting the truth of the charge and intends to plead guilty.

Cases cited:

(1) *Rex v Forde* (1923) 2 K.B., at p. 403 applied;
(2) *Rex v Essien*, W.A.C.A., 25 Jan., 1950 applied;
(3) *Otti v I.G.P.*, 1956 N.R.L.R., 1 followed;
(4) *Hattab v I.G.P.*, 1956 N.R.L.R., 24 followed;
(5) *Garba v I.G.P.*, 1956 N.R.L.R., 32 followed.

CRIMINAL APPEAL

Jones for the appellant.

David Bate, Solicitor-General, for the respondent.

Bairamian, Ag. C. J. (delivering the judgment of the Court): The appellant was convicted in the Magistrate's Court of stealing under section 390 of the Criminal Code and sentenced to nine months' imprisonment. He now appeals against that conviction. The record shows that he pleaded guilty. The first ground of appeal is that he "did not intend to plead guilty and did not believe he had pleaded guilty" and he has filed an affidavit in support. Mr. Bate raised a preliminary objection based on section 97 of the Magistrates' Courts (Northern Region) Law, which provides that—

> "In a memorandum of the grounds of appeal may set forth all or any of the following grounds, and no other....."

and goes on to state what grounds of appeal are permissible; he pointed out that they did not include a ground that the appellant did not intend to plead guilty.

It is desirable to state here in writing what was said from the bench at the time; reference was made to section 85 of that Law and to section 47 of the High Court Law.

Section 85 of the Magistrates' Courts Law provides that—

> "Any person aggrieved by a conviction or order by a magistrate in a criminal case in respect of any charge to which he pleaded not guilty or of which he did not admit the truth may appeal to the appeal court (namely the High Court) from such conviction :"

(The proviso is irrelevant here).

Section 47 of the High Court Law provides that—

> "On the hearing of any appeal against a conviction by a magistrate in a criminal case the court shall allow the appeal if they think that the judgment of the magistrate should be set aside on the ground that—
>
> (*c*) there was a miscarriage of justice."

Thus if the appellant pleaded not guilty or did not admit the truth of the charge, he is entitled to appeal; and if he can show that there was a miscarriage of justice the High Court *shall* allow the appeal. One can hardly imagine a greater miscarriage of justice than conviction and sentence without a trial in a case where the charge was not admitted.

It is pertinent here to draw attention to the fact that section 47 of the High Court Law was taken from section 11 (1) of the West African Court of Appeal Ordinance, which was taken from the

Onuoha v. I.G.P. Bairamian, Ag. C.J.

English Criminal Appeal Act of 1907, and to quote the words of Avory, J., in reading the judgment of the Court of Criminal Appeal in *Rex v Forde* (1923), 2 K.B. at p. 403, where the learned Judge said this:

> "a plea of guilty having been recorded this Court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it or (2) that upon the admitted facts he could not in law have been convicted of the offence charged."

This rule was adopted in the West African Court of Appeal in *Rex v Essien Akpan Essien*, decided on 25th January, 1950, and will be followed in this Court. It is worth noting that the ground of appeal put in—that the appellant did not intend to plead guilty—coincides with the words used by Avory, J. in the case of *Forde*.

It is also desirable to repeat here what was also said from the bench with reference to section 97 of the Magistrates' Courts Law. It purports to be a section on procedure; it comes under the cross-heading "Procedure on Appeal in Criminal Cases". The learned Solicitor-General has invoked it in order to show that the present appeal does not lie; in other words, it is a section bearing on the right of appeal. Its position in the Law, its contents and existence might then be considered in that light by the appropriate authority. We confine ourselves to observing that the provisions of section 47 of the High Court Law are mandatory and compulsive. This Court has already taken the view that section 47 of the High Court Law is the dominant section: the decision in *Otti's* appeal (*supra*) implies that view and the decisions in the cases of *Hattab* and *Garba* (*supra*) do likewise. We would therefore entertain an appeal on a ground which is not included in section 97 of the Magistrates' Courts Law if the ground is shown to be one which compels the High Court to allow the appeal under section 47 of the High Court Law.

At the same time we would point out here, as we did in the course of the argument, that the said section 97 has a paragraph (*j*) in these very wide terms:

> "(*j*) that some other specific illegality, not hereinbefore mentioned and affecting the merits of the case, has been committed in the course of the proceedings in the case."

To convict a defendant who had not pleaded guilty without a trial would certainly be an illegality affecting the merits of the case; and this may be thought to bring the present ground of appeal within the said

section 97. If it does not, the appeal lies on a ground which comes within para. (*c*) of section 47 of the High Court Law, as already stated on the authority of *Essien* and *Forde*.

It was for these reasons that we decided to hear evidence to see whether the recording of a plea of guilty had not been due to a mistake—which is fundamentally the reason for entertaining such appeals as may be seen in Roscoe's Criminal Evidence, 16th ed., at p. 250. We allowed evidence to be called to decide what, in fact, appellant's plea had been. We heard Mr. Perkins, the owner of the money, the clerk-of-court and the Ibo interpreter through whom appellant had pleaded. Mr. Perkins could not tell the Court how appellant had pleaded but his evidence was relevant in that it went to show that a plea of guilty was unlikely. He told the Court that he had been staying at the Catering Rest House and appellant was his chalet boy. He put a sum of money under his pillow; he forgot it there. He left the Catering Rest House and did not remember the money until the afternoon. He could not find it when he returned, and another person made a report to the police. Later the same afternoon he went, with a constable, to appellant's quarters. Appellant was asked about the money. He said at once that he had found it and put it in a drawer in the chalet. He took complainant to the chalet, showed him the drawer and there was the money intact. Mr. Perkins told the Court that he was so pleased with appellant's honesty that he gave him a present of £1, and said he would help appellant if there was any trouble. The clerk of court told us that he could not speak Ibo and that appellant pleaded through the Ibo interpreter. Witness said that the "interpreter said that appellant said he did take the money". Witness said "I did not hear appellant say I am Guilty or I am Not Guilty."

The interpreter insisted that appellant pleaded Not Guilty and that he correctly interpreted this plea to the Magistrate. He told us that after the appellant pleaded Not Guilty the Magistrate asked him if he took the money, and the appellant said Yes, he saw it under the bed.

We are satisfied from this evidence and from the evidence of the clerk-of-court, who gave a substantially accurate version of what happened, that appellant in answer to the charge said that he had taken the money. We are of opinion that the Magistrate took this to be a plea of Guilty and made a record to that effect. We do not accept the evidence of the interpreter that he interpreted a plea of "Not Guilty" to the Magistrate. Appellant's statement that he took the money did not amount to an admission of stealing, and the recording of a plea of guilty was a mistake.

Omuchia v. I.G.P.

Bairamian Ag. C.J.

For the avoidance of such mistakes it is desirable to have regard to section 215 of the Criminal Procedure Ordinance, which provides that—

"the charge or information shall be read over and explained to him (the person to be tried) to the satisfaction of the court".

In a case of stealing if the defendant admits that he took the money, he should be asked whether he meant to keep it for himself—whether he meant to steal it; in a case of receiving he should be asked whether he knew at the time of receiving the goods, that they were stolen goods; and so on according to the nature of the charge, so as to ensure that the defendant is admitting the truth of it and intends to plead guilty.

This appeal is allowed and the conviction and sentence are set aside; an order of re-trial is made, which shall be had unless the Attorney-General directs otherwise; and in the event of re-trial it shall be before another magistrate.

Appeal allowed.
Order for re-trial.

AMINU MODIBBO *v* ADAMAWA N.A.

[C. A. (Brown C. J., Bairamian J, Smith J.) August 3, 1956]

[Assessors: M. Musa Chief Alkali of Bida, M. Sambo Chief Alkali of Gombe, M. Aminu Wali of Bauchi, M. Sulu Gambari, M. El Nafati]

[Kaduna—Criminal Appeal No. JD/78A/1955]

Mohammedan Law—Principle that no man be judge in his own cause—Allegedly insulting letter, concerning a religious matter, sent to Ruler in Council and punishment inflicted by Ruler in Court.

The appellant was sentenced by the Lamido of Adamawa to twelve months imprisonment for writing an insulting letter to the Adamawa N.A. Council. The Lamido is President of the Council; and certain other members of the Council were members of the court by which the sentence was passed. The letter was concerned with a religious matter, *viz.* the building of a mosque. The appellant took the point that as the N.A. Council were the persons to whom the allegedly insulting letter was addressed the alleged offence ought not to have been tried in the Lamido's Court but in the Alkali's court. For the respondent it was conceded that it is a general principle of Maliki law that "no man may be judge in his own cause". But it was contended that this case was an exception to the general principle upon the grounds (*inter alia*) (*a*) that no Alkali had power to adjudicate upon a religious matter between a Ruler and a subject, and therefore (*b*) the case had, of necessity, to be tried by the Lamido in his court.

Held: Upon a consideration of this point as a preliminary point, that this case afforded no exception to the general principle, and that although the Ruler is the proper person to hear and determine religious disputes this does not apply where the dispute takes the form of a personal attack upon him; and that in such a case the principle that no man can be a judge in his own cause must be maintained.

CRIMINAL APPEAL

Appellant in person.

H. H. Marshall, Q.C., *Attorney-General* and *M. Nasir*, *Crown Counsel* for the respondent.

Brown, C. J. (delivering the judgment of the Court): This appellant was sentenced to twelve months imprisonment by the Lamido of Adamawa, in the purported exercise of his powers of Siyasa, for writing an insulting letter dated 18th August, 1955, to the Adamawa N.A. Council, of which the Lamido himself is President.

Modibbo
v.
Adamawa N. A
Brown C. J

The first point taken by the appellant, who appears in person, was that the court which inflicted this sentence upon him consisted of some of the persons to whom the allegedly insulting letter was addressed, including the Lamido, and that by Maliki law "no man can be judge in his own cause". The appellant stated—and it was not disputed—that the court consisted of the Lamido, the Waziri, the Wali, and the Galadima; and from a document which is in evidence as Exhibit A it appears that these persons, or some of them, are members of the Adamawa N.A. Council.

We thought it right to consider this as a preliminary point. If, by Maliki law, the same general principle applies as in English law that no man can be judge in his own cause, and unless this case can be brought within some exception to that general principle, this point would appear to conclude the matter and it would not be nceessary, and indeed contrary to practice, to consider—obiter—the other points raised by this appeal.

On behalf of the respondents it was conceded that in Maliki law the same general principle applies. But it was contended that by virtue of the peculiar position of the Lamido as the religious leader of the people in his Province it was not proper for him to leave this case to be tried by another court because it concerned a purely religious question. The contention put forward was that the Alkalais' courts had no power to adjudicate upon a religious dispute between the Lamido and a subject; that no distinction can be made between the Lamido sitting in Court in his judicial capacity and the Lamido sitting in Council in his administrative capacity; that the Lamido, as a religious leader, is following in the steps of the Prophet himself and in his judicial capacity has special privileges; that if a person writes an insulting letter to the Ruler and his Council he can be disciplined just as he can be displined if he insults the Ruler to his face in court; and that the Lamido, although personally concerned in the matter, necessarily had to try the case himself because, this being a religious matter in which he himself was concerned, no other court was competent to do so. In reply the appellant said that only the Prophet was allowed the special privilege of trying a case in which he himself was concerned; that this privilege does not extend to religious leaders of the present day; and that the Alkalai's courts are competent to try both religious and temporal cases.

We have been greatly assisted—and, I may add, much impressed—by five Assessors, who are Moslem jurists learned in Maliki law. With no exception their opinions are that, although the Emir is the proper person to hear and determine religious disputes, this does not apply where the dispute takes the form of a personal attack upon him, and that in such a case the principle that no man can be a judge in

his own cause must be maintained. All are agreed that if the appellant had offered the insult to the Lamido in court it would have been punishable by him as a contempt of court. But, we are advised that as the insult was conveyed in a letter it was not competent for the person who was allegedly insulted to try the case himself. I am desired by my two brother judges to say that that view accords with our own view of natural justice, equity and good conscience—and, I would add, of common sense.

If the advice which we have received had been different we might have had to consider the provisions of section 62 of the Northern Region High Court Law, 1955. In this connection we had the pleasure of listening to a careful and able argument from the Attorney-General from the aspect of English law. But, in the light of the advice which we have received from the Assessors, we are not deciding this case from the aspect of English law. We are deciding it upon Maliki law. There is no dispute that the fundamental principle which we are considering applies in Maliki law and English law alike. We cannot, in the light of the advice which we have received, agree with the contention that this case falls within any exception to that principle. The Lamido was acting as a judge in a matter in which he was personally concerned. For that reason the infliction of this punishment by him was a contravention of a basic principle of the Law by which he and all his subjects are governed. We do not need to consider any further point in this appeal. For the reason we have stated this appeal must be allowed, the order of the Lamido's Court must be set aside, and he appellant is acquitted and discharged.

Appeal allowed.

PETER AJAEGBU *v* INSPECTOR-GENERAL OF POLICE

[C.A. (Brown C.J. and Bairamian S.P.J.) 31st August, 1956]
[Makurdi—Criminal Appeal No. JD/39A/56]

"Inartistic" charges—appellant, though charged with another named person, not named in the charges—Effect of sections 147 *and* 154 (6) *of the Criminal Procedure Ord.—Offence of official corruption under section* 98 *of the Criminal Code explained and specimen charge drafted—Meaning of section* 177 (2) *of the Evidence Ordinance—The offence of conspiracy to defeat the course of justice under section* 126 *of the Criminal Code does not require that proceedings should be pending.*

The appellant was convicted with one other person (*a*) of conspiracy to defeat the course of justice, contrary to section 126 of the Criminal Code; and (*b*) of official corruption under section 98 (1). The charge of official corruption alleged that "being persons employed in the public service of Nigeria, to wit tax assessment scribe and clerk respectively, did *by virtue of such employment* receive the sum of £3-10*s*". Although the appellant's name appeared at the head of the charge sheet, it did not appear in either of the charges. The evidence upon which the appellant was convicted consisted of (*i*) the person who had given the bribe who was called by the prosecution, (*ii*) the evidence of the co-accused who gave evidence on his own behalf and heavily incriminated the appellant.

Held:

(1) in order to substantiate a charge of conspiracy to defeat the course of justice it is not necessary that proceedings should be pending.

(2) The offence of official corruption under section 98 (1) consists of corruptly obtaining the benefit *in the performance of the accused's duty*, and the charge must be so framed.

(3) However "inartistic" it may have been to omit the appellant's name from charges in which he was charged jointly with another named person, the fact that his name appeared at the head of the charge-sheet and that he pleaded to the charges showed that he was not in fact misled; and if the charges were defective, the defect was cured by the provisions of section 166 and 167 of the Criminal Procedure Ordinance

(4) When accused persons are tried jointly and any of them gives evidence on his own behalf which incriminates a co-accused, the ordinary rule regarding an accomplice's evidence applies if (*a*) the prosecution relies upon his evidence, and (*b*) the Court finds that he took part in the crime.

Case referred to:

Biobaku v Police XX N.L.R. 30 followed;
Nzegwu v Police XX N.L.R. 163 applied;
Rex v Sharpe and Stringer 26 Cr. App. R. 122 applied;
Rex v Barnes and Richards 27 Cr. App. R. 154 explained;
Oriaku and Another v Police XX N.L.R. 74 applied.

CRIMINAL APPEAL—

Eso for the appellant.

Bello, Crown Counsel, for the respondent.

Brown, C. J. (delivering the judgment of the Court): This appellant, Peter Ajaegbu, was jointly charged with one other person named Ibrahim Liman, upon two charges, and both were convicted.

The first ground of appeal which was argued by Mr. Eso is that the appellant is not named in the charges as required by section 154 (6) and 147 of the Criminal Procedure Ordinance. The charge-sheet reads as follows:—

"MM/724C/55: Inspector-General of Police V

(1) Ibrahim Liman (m) Adult Hausa

(2) Peter Ajaegbu (m) Adult Ibo.

That you Liman Ibrahim and one other during the month of September 1955 at Makurdi in the Benue Province in the Jos Magisterial District, did conspire with each other to defeat the course of justice and thereby committed an offence punishable under section 126 of the Criminal Code.

Second Count:

That you Ibrahim Liman and one other during the month of September 1955 at Makurdi in the Benue Province in the Jos Magisterial District being persons employed in the public service of Nigeria to wit tax assessment scribe and clerk respectively did by virtue of such employment receive the sum of £3-10*s* (three pounds and ten shillings) that you shall conceal the offence of fraudulence and stealing committed by Ibrahim Shehu and thereby committed an offence punishable under section 98 (1) of the Criminal Code".

It will be observed that, although the 1st accused (who has not appealed) is named in the charges, the 2nd accused (the present appellant) is not. The appellant appears in the charges as "one other". This is said to contravene the provisions of sections 154 (6) and 147.

Ajaegbu
v.
I.G.P.
Brown C. J

Section 154 (6) says that the "description or designation of the accused in a *charge*.....may be described in the manner set forth in section 147". Section 147 contains no reference to a *charge*. It deals with the *charge sheet*. And it says that "where in any.....charge sheet.....it is necessary to refer to any person the description or designation of that person shall be such as is reasonably sufficient to identify him.....".

In the charge-sheet (which I have quoted verbatim) the name of the appellant appears in the first line, though it does not appear in those parts of the charge sheet which form the charges. Therefore it does not seem to me that the provisions of the C.P.O. which have been referred to are contravened, however inartistic the drafting of the charges may be. Moreover it seems to me that if the name of the 1st accused had also been omitted from the charges so that, after stating the names of the two accused (I.G.P. *v* (1) Ibrahim Liman, (2) Peter Ajaegbu) the charges read: "That you during the montth of September ....." no complaint could be made because it would be in accordance with the form of specimen charges contained in the Second Schedule. But however that may be, if there was a defect in the charges it is clearly cured by the provisions of sections 166 and 167. With regard to section 166 the appellant cannot have been in fact misled because (*a*) his name appears in the charge-sheet, and (*b*) he pleaded to the charges.

It will now be convenient to pass to the last ground of appeal which was argued, namely that the second charge discloses no offence. On behalf of the respondent M. Bello conceded that the charge was bad. But although it is not disputed that the conviction upon this charge cannot be maintained, the section is one which seems to cause prosecuting officers and Magistrates some little difficulty and it may be helpful if I add my contribution to the many reported decisions which already appear in the Nigerian Law Reports dealing with this section.

The second charge is laid under section 98 (1) of the Cirminal Code. The essence of an offence under that section is that the money is corruptly obtained by the accused *in the performance of his duty*. As was said by Bairamian, J., in *Biobaku v Police* (XX N.L.R. 30)—

> "The mischief aimed at in section 98 is the receiving or offering of some benefit as a reward or inducement to sway or deflect the officer from the honest and impartial discharge of his duties—in other words as a bribe for corruption or its price".

That is the essence of an offence under section 98 (1): that the accused corruptly accepts a bribe which deflects him from the honest and impartial exercise of his duties. But that is not what this charge says. It charges the appellant with receiving the money *by virtue of his employment as a tax clerk*. Such an allegation, as de Comarmond, S.P.J. pointed out in the case of *Nzegwu v Police* (XX N.L.R. at page 164) is absurd, because it was no part of his employment as a tax clerk to obtain this money corruptly; it was indeed the reverse of what his employment required.

It is always advisable in framing a charge to follow the wording of the section as far as possible; and it may be of assistance if I draft the second charge as I think it should have been framed. I would have drafted it in this way—

> That you, Ibrahim Liman and Peter Ajaegbu, during the month of September, 1955, at Makurdi in the Benue Province in the Jos Magisterial District, being persons employed in the public service, to wit Tax Assessment Scribe and Finance Clerk respectively in the employment of the Makurdi N.A., and being charged with the performance of a duty by virtue of such employment (not being a duty touching the administration of justice), to wit the duty of checking the counterfoils of tax receipts, did in the discharge of the duties of your office corruptly receive the sum of £3-10*s* from one Ibrahim Shehu in order to conceal irregularities in the tax accounts of the said Ibrahim Shehu, contrary to section 98 (1) of the Criminal Code.

Thus the ingredients which the prosecution would have to prove are—

(*a*) that the accused were employed by the Makurdi N.A. as Tax Assessment Scribe and Finance Clerk;

(*b*) that it was their duty to check the counterfoil receipts;

(*c*) that they received £3-10*s* from Ibrahim Shehu;

(*d*) for the corrupt purpose of concealing irregularities in Ibrahim Shehu's accounts.

I may say that in this case only one witness to the facts was called by the prosecution, namely Ibrahim Shehu. No attempt was made by the prosecution to prove ingredient (*a*) in the case of the appellant. This was proved by the appellant himself in the first line of his evidence. Nor was any attempt made to prove ingredient (*b*) in the case of either accused—no doubt because the charge as drafted omitted any reference to their duty to check the counterfoil receipts, which should have been an essential part of the charge. If I may adopt the words of de Comarmond, S.P.J. in *Nzegwu's* case—

Ajaegbu v I.G.P. Brown C J

"The consequence of that omission was that the charge failed to bring out the gist of the offence, namely, that money was asked or received or obtained by the accused on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done by him in the discharge of the duties of his office".

The prosecution ought to have called an officer from the Makurdi N.A. to prove ingredients (*a*) and (*b*); and then Ibrahim Shehu to prove (*c*) and (*d*).

Upon the first charge it was also argued that in order to substantiate the offence of conspiracy to defeat the course of justice, contrary to section 126 of the Criminal Code, there must be some proceeding pending; and that the charge which was appropriate to the facts of this case was a charge under section 127. This point was settled by the case of *Rex v Sharpe and Stringer* (26 Cr. App. R. 122); and the head-note to that case reads—

"It is sufficient to constitute the crime of conspiracy to defeat the course of public justice if persons conspire to conceal a crime which has been committed, although no proceedings are pending or have been commenced".

In that case the two appellants were driving to a dance, each in his own car. On the way Stringer's car struck and injured a cyclist. Stringer did not stop. Sharpe and Stringer agreed to say nothing about it. Sharpe later proceeded alone to the scene of the accident and found an ambulance with a number of helpers, but said nothing of what he knew about the accident. The bicycle was found with some red paint on it. Subsequently Police Officers called on Stringer and inspected his car, which was painted red. They found that the head lamps were fitted with new bolts, which Stringer said that he had obtained from a carpenter named Osborne. On the following day Stringer went to Osborne and asked him to say that he had provided the bolts. Osborne told the agreed lie to the Police, but later, when the Police interviewed Stringer in his presence, admitted that he had made a false statement. du Parq, J., in delivering the judgment of the Court of Criminal Appeal said—

"Public justice requires not only that people should not take steps to conceal a crime or destroy evidence once a summons has been served upon somebody, but also that every crime should be suitably dealt with, and a man who obstructs public justice as soon as a crime is committed and endeavours to avoid the consequences of his wrong-doing by conspiracy with others is just as much guilty of an offence as if he waits until after proceedings are actually pending".

I now pass to the remaining ground of appeal—and the one that has caused us most difficulty—namely that the only evidence against the appellant is the evidence of the accomplice Ibrahim Shehu, and of Ibrahim Limar (the other accused). The passage from the judgment which bears upon this matter is as follows:—

> "It (i.e. the 1st accused's evidence) amounts to a confession by the 1st accused, and heavily incriminates the 2nd accused..... I have to decide whether I believe it, and then whether I can safely convict on it.....Why should the 1st accused risk telling lies that are bound to land him in trouble himself ? On careful consideration, allowing for the fact that P.W.1. has been convicted of a crime involving fraud, I believe the evidence for the prosecution against the 2nd accused and reject his denials. Is it safe to convict 2nd accused on that evidence ? P.W.1 might be held to be an accomplice on the first count of conspiracy, but he is amply corroborated by 1st accused. Normally, an accomplice cannot corroborate another accomplice, but that rule applies only to witnesses called for the prosecution. 1st accused here has given evidence deeply incriminating 2nd accused, and is not to be viewed as an accomplice (33rd Ed. of Archbold p.482). In my view, the evidence against both accused on the 1st count is solid and acceptable, and I have no hesitation in convicting."

The reference in Archbold is to the case of *Rex v Barnes and Richards* (27 Cr. App. R. 154; 1940 2 A.E.R. 229). And to say that that case is authority for the proposition that no participant in the cirme is to be viewed as an accomplice unless he is called as a witness for the prosecution is not correct. In that case the two appellants were charged with three other persons—a man and two women—who were acquitted. They gave evidence on their own behalf, and in excusing themselves the two women threw blame on the two appellants. Their evidence was no part of the case for the prosecution, nor was the jury being asked to act upon the evidence given by either of the women. And by acquitting the two women the jury found that they were not accomplices. But the present case was very different. Here the prosecution case consisted of one witness to the facts, namely Ibrahim Shehu the accomplice. Their only other witness gave formal evidence which had no bearing on this appellant. The 1st accused then elected to give evidence, in which he in effect confessed to his own part in the crime and deeply incriminated the appellant. The learned Magistrate then proceeded to convict the appellant upon the 1st accused's evidence, which he says "amply corroborated" the evidence of the accomplice who was called by the prosecution.

To say that a participant in a crime is not to be viewed as an accomplice unless he is called as a witness for the prosecution is such a

Ajaegbu v. I.G.P. Brown C. J

misconception of *Barnes's* case that it would be difficult to understand if it were not for the provisions of section 177 (2) of the Evidence Ordinance (which the learned Magistrate does not make specific reference to in his judgment). That subsection says—

> "177 (2). Where accused persons are tried jointly and any of them gives evidence on his own behalf which incriminates a co-accused the accused who gives such evidence shall not be considered to be an accomplice."

The bald statement of the law contained in that subsection was considered by the Supreme Court of Nigeria in the case of *Oriaku and Another v. Police* (XX N.L.R. 74). In that case it was said that the subsection was intended to give statutory effect to the principle laid down in *Barnes's* case. If that is so, I can only say that the intention failed. I would add that, if that was the intention, *Oriaku's* case was decided in 1952, and that for four years the Legislature has been content to leave the subsection in its existing form and to take no step to give effect to its intention, notwithstanding the decision in *Oriaku's* case. In that case Hubbard J. said—

> "There is, however, as far as I am aware, no authority for saying that where the case for the prosecution rests solely or mainly on the evidence of a co-accused, who is found guilty of the offence, the latter is not to be treated as an accomplice. In fact, the matter appears so clear to me that I should have thought there could be no argument about it. I have no hesitation in holding that section 177 of the Evidence Ordinance should be read as meaning that the accused who gives the incriminating evidence shall not be considered to be an accomplice merely by virtue of the fact that his evidence happens to incriminate a co-accused, it being understood, however, that if the case for the prosecution rests upon this incriminating evidence and the Court finds that the accused who gave it did take part in the commission of the offence, then corroboration is necessary."

That, if I may respectfully say so, appears to me to be good sense. This Court has inherited the jurisdiction of the former Supreme Court of Nigeria in this Region and, although I may not be free from doubt whether the decision did not add something to section 177 (2) in an attempt to make reasonable sense of it, I consider that we should follow that decision. It may be that the Legislature will wish to re-consider the subsection now, in the light of Oriaku's case and of this case, with a view to implementing their intention (if it was their intention) of giving statutory effect to the principle laid down in Barnes's case.

In the present case it is impossible to say that if the learned Magistrate had appreciated that in relying upon the evidence of the 1st accused he was relying upon the evidence of a participant in the crime, who ought to be viewed in the light of an accomplice, he would have been prepared to convict without corroboration. And when the learned Magistrate says that the rule whereby one accomplice cannot corroborate another accomplice only applies to witnesses who are called by the prosecution he did not take account of the decision in *Oriaku's* case. For that reason it seems to us that the appeal on the first charge must also be allowed.

In the result the conviction and sentence of the appellant on both counts are set aside, and the appellant is discharged.

Appeal allowed.

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THE HIGH COURT
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OF NIGERIA,
1957

Hon. Sir Thomas Algernon Brown, Chief Justice
Hon. Mr Justice Bairamian, Senior Puisne Judge*
Hon. Mr Justice Hurley, Senior Puisne Judge*
Hon. Mr Justice Smith, Judge
Hon. Mr Justice Reed, Judge*
Hon. Mr Justice Bate, Judge*

*Hon. Mr Justice Bairamian was appointed Chief Justice of Sierra Leone on the 8th August, 1957, and was succeeded as Senior Puisne Judge by Hon. Mr Justice Hurley on the 8th August, 1957.
Hon. Mr Justice Reed was appointed on the 20th October, 1956.
Hon. Mr Justice Bate upon the 22nd August, 1957.

THE LAW REPORTING COMMITTEE

of the

NORTHERN REGION OF

NIGERIA,

1957

Hon. the Chief Justice, *ex-officio*, Chairman

Ian McLean, Esquire, Crown Counsel

L. O. V. Anionwu, Esquire, Barrister-at-Law*

Kayode Eso, Esquire, Barrister-at-Law*

*Mr Kayode Eso was appointed on the 24th July, 1957, to succeed Mr Anionwu, who relinquished his post on leaving the Northern Region.

INDEX OF CASES

CASES JUDICIALLY CONSIDERED

Amachree *v* Newington, XX N.L.R. 13; 14 W.A.C.A. 97. *Followed*, Ogenyi *v* Inspector-General of Police, (1957) N.R.N.L.R. 140.

Ayuba Dan Rufai Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 57. *Affirmed*, Ayuba Dan Rufai Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 84 (F.S.C.); *Disapproved*, Jalo Tsamiya *v* Bauchi Native Authority, (1957) N.R.N.L.R. 73 (F.S.C.); *Considered*, Mamman Tungar Maizabo *v* Sokoto Native Authority, (1957) N.R.N.L.R. 133 (F.S.C.).

Beti Runka *v* Katsina Native Authority, 13 W.A.C.A. 98: *Followed*, Mai Rai *v* Bauchi Native Authority, (1957) N.R.N.L.R. 31.

Biobaku *v* Police, XX N.L.R. 30: *Followed*, R. *v* Usuman Pategi (1957) N.R.N.L.R. 47; *Referred to*, Ameh *v* Inspector-General of Police (1957) N.R.N.L.R. 28.

Davenport *v* The Queen, (1877) 3 App. Cas. 115; *Applied*, Majiyagbe *v* Attorney-General (1957) N.R.N.L.R. 158.

Davies *v* Director of Public Prosecutions, (1954) A.C. 378; 38 Cr. App. R. 11; (1954) 1 A.E.R. 507: *Referred to*, R. *v* Agbeze Onuegbe (1957) N.R.N.L.R. 126.

Dilworth *v* Commissioner of Stamps, (1899) A.C. 99: *Applied*, Jalo Tsamiya *v* Bauchi Native Authority, (1957) N.R.N.L.R. 73 (F.S.C.)

Edu *v* Commissioner of Police, 14 W.A.C.A. 163: *Applied*, R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47; *Referred to*, Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 89; *Followed*, Ogenyi *v* Inspector-General of Police, (1957) N.R.N.L.R. 140; *Distinguished*, Inspector-General of Police *v* Ighoroji, (1957) N.R.N.L.R. 182.

Egba Native Authority *v* Adeyanju, XIII N.L.R. 77: *Applied*, Mai Rai *v* Bauchi Native Authority, (1957) N.R.N.L.R. 31.

Egwurube *v* Inspector-General of Police, (1957) N.R.N.L.R. 102: *Disapproved*, Okoronkwo *v* Inspector-General of Police, (1957) N.R.N.L.R. 124 (F.S.C.).

Elias *v* Pasmore, (1934) 2 K.B. 164: *Applied*, Nwagu *v* Lawal Wawa, (1957) N.R.N.L.R. 187.

Emone *v* Inspector-General of Police, (1956) N.R.N.L.R. 55: *Applied*, Quartey *v* Inspector-General of Police, (1957) N.R.N.L.R. 38.

Fagoji *v* Kano Native Authority, (1957), N.R.N.L.R. 57: *Affirmed*, Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 84 (F.S.C.); *Disapproved*, Jalo Tsamiya *v* Bauchi Native Authority, (1957) N.R.N.L.R. 73; *Considered*, Mamman Tungar Maizabo *v* Sokoto Native Authority, (1957) N.R.N.L.R. 133 (F.S.C.).

Fashola *v* Police, XX N.L.R. 126: *Followed*, Quartey *v* Inspector-General of Police, (1957) N.R.N.L.R. 38

Fashusi *v* Police, XX N.L.R. 126: *Followed*, Quartey *v* Inspector-General of Police, (1957) N.R.N.L.R. 38.

Flatman *v* Light, (1946) 2 A.E.R. 369: *Applied*, Inspector-General of Police *v* Ighoroji, (1957) N.R.N.L.R. 182.

Gishiwa Gana *v* Bornu Native Authority, 14 W.A.C.A. 587: *Not followed*, Ayuba Dan Rufai Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 57; *Approved*, Jalo Tsamiya *v* Bauchi Native Authority, (1957) N.R.N.L.R. 73 (F.S.C.).

Grey *v* Pearson, (1857) 6 H.L.C. 106: *Applied*, Inspector-General of Police *v* Marke (1957) N.R.N.L.R. 89.

Gubba *v* Gwandu Native Authority, 12 W.A.C.A. 141: *Considered*, Ayuba Dan Rufai Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 57.

Halstead *v* Clark, (1944) 1 A.E.R. 270: *Considered*, Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 89.

Harrison *v* Duke of Rutland, (1893) 1 Q.B. 142: *Distinguished*, Rufai *v* Igbirra Native Authority, (1957) N.R.N.L.R. 178.

Hattab *v* Inspector-General of Police, (1956) N.R.N.L.R. 24: *Applied*, Onyirokwu *v* Inspector-General of Police, 1957 N.R.N.L.R. 173; *Followed*, Ebute *v* Inspector-General of Police, (1957) N.R.N.L.R. 194.

Hope *v* Brown, (1954) 1 W.L.R. 250; *Applied*, Orija *v* Inspector-General of Police, (1957) N.R.N.L.R. 189.

Idi Wonaka *v* Sokoto Native Authority, (1956) N.R.N.L.R. 15: *Referred to* Jalo Tsamiya *v* Bauchi Native Authority, (1957) N.R.N.L.R. 73 (F.S.C.).

Idi Wonaka *v* Sokoto Native Authority, (1956) N.R.N.L.R. 19 (F.S.C.): *Explained*, Jalo Tsamiya *v* Bauchi Native Authority, (1957) N.R.N.L.R. 73 (F.S.C.).

Ikubaiyeje *v* Reis, XVII N.L.R. 12: *Distinguished*, Chimezie *v* Dike, (1957) N.R.N.L.R. 43.

Jalo Tsamiya *v* Bauchi Native Authority, (1957) N.R.N.L.R. 73 (F.S.C.): *Followed*, Ayuba Dan Rufai Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 84 (F.S.C.); *Qualified*, Mamman Tungar Maizabo *v* Sokoto Native Authority, (1957) N.R.N.L.R. 133 (F.S.C.).

Kemavor *v* Commissioner of Police, 7 W.A.C.A. 198: *Distinguished*, Umole *v* Inspector-General of Police (1957) N.R.N.L.R. 8.

Leeson *v* Leeson, (1932) 2 K.B. 156: *Followed*, Societe Commerciale de L'Ouest Africain *v* Obi, (1957) N.R.N.L.R. 85.

Macaulay *v* Seriki, VI N.L.R. 92: *Distinguished*, Dabiri *v* Dabiri, (1957) N.R.N.L.R. 121.

Mark *v* Toe, 2 W.A.C.A. 170: *Distinguished*, Chimezie *v* Dike, (1957) N.R.N.L.R. 43.

Moore *v* Ullcoats Mining Co., (1908) 1 Ch. 575: *Followed*, Majiyagbe *v* Attorney-General, (1957) N.R.N.L.R. 158.

Motayo *v* Commissioner of Police, 13 W.A.C.A. 114: *Applied*, Elumelu *v* Inspector-General of police, (1957) N.R.N.L.R. 17.

Ogbebor *v* Commissioner of Police, 13 W.A.C.A. 22: *Followed*, Ogenyi *v* Inspector-General of Police, (1957) N.R.N.L.R. 140.

Okeke *v* Inspector-General of Police, 12 W.A.C.A. 363: *Followed*, R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47.

Otti *v* Inspector-General of Police, (1956) N.R.N.L.R. 1; *Distinguished*, Joseph *v* Inspector-General of Police, (1957) N.R.N.L.R. 170.

Parker *v* Guiness, (1910) 27 T.L.R. 129: *Applied*, Societe Commerciale de L'Ouest Africain *v* Obi, (1957) N.R.N.L.R. 85.

Rabo Maroki *v* Kano Native Authority, (1956) N.R.N.L.R. 5: *Applied*, Kawule Dan Tukur Indabo *v* Kano Native Authority, (1957) N.R.N.L.R. 33.

Reed *v* Nutt, (1890), 24 Q.B.D. 669: *Applied*, Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 89.

R *v* Ashigifuwo, 12 W.A.C.A. 389: *Applied*, R. *v* Yayiye of Kadi Kadi, (1957) N.R.N.L.R. 207.

R. *v* Bernard, 26 Cr. App. R. 137: *Applied*, Yusufu Tudun Wada *v* Inspector-General of Police, (1957) N.R.N.L.R. 1; *and also* R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47.

R. *v* Davidson, 20 Cr. App. R. 66: *Cited*, Adamu Muri *v* Inspector-General of Police, (1957) N.R.N.L.R. 5.

R. *v* Duke of Leinster, 17 Cr App. 147: *Considered*, Adamu Muri *v* Inspector-General of Police, (1957) N.R.N.L.R. 5.

R. *v* Echem, 14 W.A.C.A. 158: *Applied*, R. *v* Yayiye of Kadi Kadi, (1957) N.R.N.L.R. 207.

R. *v* Enwa, 9 W.A.C.A. 194: *Distinguished*, R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47.

R. *v* Ezejiogu, 10 W.A.C.A. 230: *Distinguished*, Ebute *v* Inspector-General of Police, (1957) N.R.N.L.R. 194.

R. *v* Eagleton, 169 E.R. 766: *Followed*, Orija *v* Inspector-General of Police, (1957) N.R.N.L.R. 189.

R. *v* Gordon, 7 Cr. App. R. 182: *Cited*, Adamu Muri *v* Inspector-General of Police, (1957) N.R.N.L.R. 5.

R. *v* Gott, 16 Cr. App. R. 86: *Cited*, Adamu Muri *v* Inspector-General of Police, (1957) N.R.N.L.R. 5.

R. *v* Homeson and Hardy, 25 Cr. App. R. 152: *Cited*, Adamu Muri *v* Inspector-General of Police, (1957) N.R.N.L.R. 5.

R. *v* Ijoma, 12 W.A.C.A. 220: *Referred to*, Elumelu *v* Inspector-General of Police, (1957) N.R.N.L.R. 17; *and* Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 89.

R. *v* Keary, 14 Cox C.C. 385: *Referred to*, R. *v* Yayiye of Kadi Kadi, (1957) N.R.N.L.R. 207.

R. *v* Klein, 23 Cr. App. R. 173: *Cited*, Adamu Muri *v* Inspector-General of Police, (1957) N.R.N.L.R. 5.

R. *v* McNally, (1954) 2 A.E.R. 372: *Applied*, Inspector-General of Police *v* Ighoroji, (1957) N.R.N.L.R. 182.

R. *v* MacNaughton, (1843) 4 St. Tr. (N.S.) 847: *Distinguished*, R. *v* Yayiye of Kadi Kadi, (1957) N.R.N.L.R. 207.

R. *v* Marcellus, XX N.L.R. 155: *Followed*, Onyirokwu *v* Inspector-General of Police, (1957) N.R.N.L.R. 173.

R. *v* Omoni, 12 W.A.C.A. 511: *Followed*, R. *v* Yayiye of Kadi Kadi, (1957) N.R.N.L.R. 207.

R. *v* Payne, 34 Cr. App. R. 43: *Applied*, Umole *v* Inspector-General of Police, (1957) N.R.N.L.R. 8.

R. *v* Robertson, 10 Cox C.C. 9: *Applied*, Yusufu Tudun Wada *v* Inspector-General of Police, (1957) N.R.N.L.R. 1.

R. *v* Selkirk, 18 Cr. App. R. 172: *Cited*, Adamu Muri *v* Inspector-General of Police, (1957) N.R.N.L.R. 5.

R. *v* Starkie, 24 Cr. App. R. 1: *Considered*, Adamu Muri *v* Inspector-General of Police, (1957) N.R.N.L.R. 5.

R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47: *Distinguished*, Inspector-General of Police *v* Ighoroji, (1957) N.R.N.L.R. 182.

R. *v* Walton, 9 Cox C.C.: *Followed*, Yusufu Tudun Wada *v* Inspector-General of Police, (1957) N.R.N.L.R. 1.

Rabo Maroki *v* Kano Native Authority, (1956) N.R.N.L.R. 5: *Applied*, Kawule Dan Tukur Indabo *v* Kano Native Authority, (1957) N.R.N.L.R. 33.

Serjeant *v* Nash, Field and Co., (1903) 2 K.B. 304: *Followed*, Majiyagbe *v* Attorney-General, (1957) N.R.N.L.R. 158.

Sogbanmu *v* Inspector-General of Police, 2 W.A.C.A. 336: *Applied*, Onyirokwu *v* Inspector-General of Police, (1957) N.R.N.L.R. 173; *and* Ebute *v* Inspector-General of Police, (1957) N.R.N.L.R. 194.

Stepney Corporation *v* Osofsky, (1936) 3 A.E.R. 494: *Followed*, Societe Commerciale de L'Ouest Africain *v* Obi, (1957) N.R.N.L.R. 85.

Tsofo Gubba *v* Gwandu Native Authority, 12 W.A.C.A. 141: *Considered*, Ayuba Dan Rufai Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 57.

Umoru Mafindi *v* Bauchi Native Authority, (1956) N.R.N.L.R. 41: *Followed*, R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47; *and* Duru *v* Gumel Native Authority, (1957) N.R.N.L.R. 151.

Warner *v* Morris, 16 Ch.D. 100: *Applied*, Dabiri *v* Dabiri, (1957) N.R.N.L.R. 121.

Winsor *v* The Queen, (1866) L.J.Q.B. 289, 390; 10 Cox C.C. 327; 36 L.J.M.C 121, 161: *Applied*, Umole *v* Inspector-General of Police, (1957) N.R.N.L.R. 8.

Young *v* Bristol Aeroplane Co. Ltd., (1944) 1 K.B. 718; (1944) 1 A.E.R. 98 H.L.: *Applied*, Ayuba Dan Rufai Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 57.

LAWS, ORDINANCES AND RULES OF NIGERIA JUDICIALLY CONSIDERED

Criminal Code No. 15 of 1916

s. 16	R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47.

Criminal Code (Amendment) Ordinance No. 43 of 1945

s. 7	R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47.

Criminal Code (Cap. 42) Laws of Nigeria

s. 4	Ayuba Dan Rufai Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 57; Jalo Tsamiya *v* Bauchi Native Authority, (1957) N.R.N.L.R. 73 (F.S.C.).
s. 28	R. *v* Yayiye of Kadi Kadi, (1957) N.R.N.L.R. 207.
s. 69	Ogenyi *v* Inspector-General of Police, (1957) N.R.N.L.R. 140.
s. 98	R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47.
s. 99	R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47.
s. 116	Ebute *v* Inspector-General of Police, (1957) N.R.N.L.R. 194.
s. 126(2)	Onyirokwu *v* Inspector-General of Police, (1957) N.R.N.L.R. 173.
s. 356(2)	Onobu *v* Inspector-General of Police, (1957) N.R.N.L.R 25; Ogenyi *v* Inspector-General of Police, (1957) N.R.N.L.R. 140.
s. 383	Yusufu Tudun Wada *v* Inspector-General of Police, (1957) N.R.N.L.R. 1.
s. 404(1)(*a*)	Elumelu *v* Inspector-General of Police, (1957) N.R.N.L.R. 17.
s. 406	Yusufu Tudun Wada *v* Inspector-General of Police, (1957) N.R.N.L.R. 1.

Criminal Procedure Ordinance (Cap. 43) Laws of Nigeria

s. 75	Inspector-General of Police *v* Marke, (1957) N.R.N.L.R 97. (F.S.C.).
s. 152(1)	Ogenyi *v* Inspector-General of Police, (1957) N.R.N.L.R. 140.
s. 154(5)(*a*)	Ogenyi *v* Inspector—General of Police, (1957) N.R.N.L.R. 140.
s. 154(6)	Ogenyi *v* Inspector-General of Police, (1957) N.R.N.L.R. 140.
s. 163	Elumelu *v* Inspector-General of Police, (1957) N.R.N.L.R. 17.
s. 181	R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47; Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 89; Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 97 (F.S.C.).
s. 185	Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 89; Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 97 (F.S.C.).
s. 217	Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 89.

s. 221	Inspector-General of Police *v* Ighoroji, (1957) N.R.N.L.R. 182
s. 229	R. *v* Yayiye of Kadi Kadi, (1957) N.R.N.L.R. 207.
s. 286	Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 89; Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 97 (F.S.C.)
s. 299	Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 89.
s. 301	Inspector-General of Police *v* Marke (1957) N.R.N.L.R. 89; Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 97 (F.S.C.).
s. 361	Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 89.
s. 363	Inspector-General of Police *v* Marke, (1957) N.R.N.L.R. 89.

EVIDENCE ORDINANCE (CAP. 63) LAWS OF NIGERIA

s. 96(1)(*a*)	Iphie *v* Plateau Auditing Co., (1957) N.R.N.L.R. 212.
s. 97	Iphie *v* Plateau Auditing Co., (1957) N.R.N.L.R. 212.
s. 177(2)	R. *v* Agbeze Onuegbe, (1957) N.R.N.L.R. 126 (F.S.C.).

INCREASE OF RENT (DEFINITION OF PREMISES) (GENERAL APPLICATION) CONSOLIDATION ORDER, 1942

s. 3	Lasaki *v* Dabian, (1957) N.R.N.L.R. 12.

INCREASE OF RENT (RESTRICTION) (MODIFICATION FOR NATIVE LANDS IN NORTHERN PROVINCES) ORDER-IN-COUNCIL, 1950

s. 2	Lasaki *v* Dabian, (1957) N.R.N.L.R. 12.

INCREASE OF RENT (RESTRICTION) ORDINANCE (CAP. 93) LAWS OF NIGERIA

s. 7(11)	Lasaki *v* Dabian, (1957) N.R.N.L.R. 12.

INTERPRETATION ORDINANCE (CAP. 94) LAWS OF NIGERIA

s. 47(2)	Majiyagbe *v* Attorney-General, (1957) N.R.N.L.R. 158.

JUDGMENTS (ENFORCEMENT) RULES, LAWS OF NIGERIA

o. IV. r. 16(2)	Mutual Aid Society Ltd. *v* Ogonade, (1957) N.R.N.L.R. 118.

LAND AND NATIVE RIGHTS ORDINANCE (CAP. 105) LAWS OF NIGERIA

s. 12(*a*)	Majiyagbe *v* Attorney-General, (1957) N.R.N.L.R. 158.

MAGISTRATES' COURTS (NORTHERN REGION) LAW, 1955

s. 20(*a*)	Quartey *v* Inspector-General of Police, (1957) N.R.N.L.R. 38.
s. 32(2)	Rufai *v* Igbirra Native Authority, (1957) N.R.N.L.R. 178.
s. 99(4)	Adamu Muri *v* Inspector-General of Police, (1957) N.R.N.L.R. 5.

MAGISTRATES' COURTS (NORTHERN REGION) RULES, 1955

o. XXII r. 1.	Iphie *v* Plateau Auditing Co., (1957) N.R.N.L.R. 212.

MAGISTRATES' COURTS ORDINANCE (CAP. 122) LAWS OF NIGERIA

s. 20 — Quartey *v* Inspector-General of Police, (1957) N.R.N.L.R. 38.

s. 21 — Emone *v* Inspector-General of Police, (1957) N.R.N.L.R. 49.

MAGISTRATES' COURTS (APPEALS) ORDINANCE (CAP. 123) LAWS OF NIGERIA

s. 2 — Egwurube *v* Inspector-General of Police, (1957) N.R.N.L.R. 102.

s. 36 — Egwurube *v* Inspector-General of Police, (1957) N.R.N.L.R. 102.

MINERALS ORDINANCE (CAP. 134) LAWS OF NIGERIA

s. 2 — Ejukorlem and Company Limited *v* Chief Inspector of Mines, (1957) N.R.N.L.R. 200.

s. 13 — Ejukorlem and Company Limited *v* Chief Inspector of Mines, (1957) N.R.N.L.R. 200.

s. 66(*a*) — Ejukorlem and Company Limited *v* Chief Inspector of Mines, (1957) N.R.N.L.R. 200.

s.66(*d*) — Ejukorlem and Company Limited *v* Chief Inspector of Mines, (1957) N.R.N.L.R. 200.

NATIVE COURTS' LAW, 1956, OF THE NORTHERN REGION

s. 67 — Ayuba Dan Rufai Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 57; Jalo Tsamiya *v* Bauchi Native Authority, (1957) N.R.N.L.R. 73; Mamman Tungar Maizabo *v* Sokoto Native Authority, (1957) N.R.N.L.R. 133.

NATIVE COURTS' ORDINANCE (NO. 44 OF 1933) LAWS OF NIGERIA

s. 25(1)(*c*) — R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47.

NATIVE COURTS' (AMENDMENT) ORDINANCE (NO. 16 OF 1936) LAWS OF NIGERIA

s. 5 — R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47.

NATIVE COURTS' (AMENDMENT) ORDINANCE (NO. 8 OF 1938) LAWS OF NIGERIA

s. 6 — R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47.

NATIVE COURTS' ORDINANCE (CAP. 142) LAWS OF NIGERIA

s. 10A — Ayuba Dan Rufai Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 57; Jalo Tsamiya *v* Bauchi Native Authority, (1957) N.R.N.L.R. (F.S.C.); Mamman Tungar Maizabo *v* Sokoto Native Authority, (1957) N.R.N.L.R. 133 (F.S.C.).

s. 20 — Chimezie *v* Dike, (1957) N.R.N.L.R. 43.

s. 28(1)(*b*) — R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47.

s. 28(10) — R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47.

s. 40A(2) — Ayuba Dan Rufai Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 57.

NORTHERN REGION HIGH COURT LAW, 1956

s. 47 — Otti *v* Inspector-General of Police, (1957) N.R.N.L.R. 1.

s. 47 prov.	Ogenyi *v* Inspector-General of Police, (1957) N.R.N.L.R. 140.
s. 58	Okoronkwo *v* Inspector-General of Police, (1957) N.R.N.L.R. 124 (F.S.C.).
s. 81	Commissioner of Income Tax *v* Nigeria Oil Mills, Limited, (1957) N.R.N.L.R. 111.

POLICE ORDINANCE (CAP. 172) LAWS OF NIGERIA

s. 38(*a*)	Joseph *v* Inspector-General of Police, (1957) N.R.N.L.R. 170.

RECOVERY OF PREMISES (WITHDRAWAL OF APPLICATION TO CERTAIN AREAS) ORDER-IN-COUNCIL, 1946

Lasaki *v* Dabian, (1957) N.R.N.L.R. 12.

ROAD TRAFFIC ORDINANCE (No. 43 OF 1947) LAWS OF NIGERIA

s. 2	Stock *v* Commissioner of Police, (1957) N.R.N.L.R. 198.
s. 8	Okeke *v* Inspector-General of Police, (1957) N.R.N.L.R. 23

ROAD TRAFFIC REGULATIONS. 1947

Reg. 39(3)	Okeke *v* Inspector-General of Police, (1957) N.R.N.L.R. 23.
Reg. 44(*e*)	Nwagu *v* Lawal Wawa, (1957) N.R.N.L.R. 187.

SHERIFFS AND ENFORCEMENT OF JUDGMENTS AND ORDERS ORDINANCE (CAP. 205) LAWS OF NIGERIA

s. 43	Mutual Aid Society Limited, *v* Ogonadc, (1957) N.R.N.L.R. 118.

SUPREME COURT (CIVIL PROCEDURE) RULES, LAWS OF NIGERIA

o. XIII r. 2	Dabiri *v* Dabiri, (1957) N.R.N.L.R. 121.
o. XXVI r. 3	Elliott Saville and Company *v* Ibrahim Lansari, (1957) N.R.N.L.R. 165.
o. XXVI r. 4(*a*)	Elliott Saville and Company *v* Ibrahim Lansari, (1957) N.R.N.L.R. 165.
o. XXVI r. 4 prov.	Elliott Saville and Company *v* Ibrahim Lansari, (1957) N.R.N.L.R. 165.
o. XXVIII r. 12	Commissioner of Income Tax *v* Nigeria Oil Mills Limited, (1957) N.R.N.L.R. 111.
o. XXXIII r. 12	Commissioner of Income Tax *v* Nigeria Oil Mills Limited, (1957) N.R.N.L.R. 111.

INDEX OF SUBJECT MATTER

APPEAL

Appeal—Bail after conviction and pending appeal—Principles upon which bail is granted in those circumstances—Meaning of 'special circumstances'—Section 99(4) Magistrates' Courts (Northern Region) Law, 1955.

Adamu Muri *v* Inspector-General of Police
(1957) N.R.N.L.R. 5 (C.A.)

Grounds of appeal—Additional grounds—Application for extension of time in which to file additional grounds of appeal—Powers of High Court of the Northern Region—Definition of 'Magistrate's Court' contained in section 2 Magistrates' Courts (Appeals) Ordinance—Application of section 36 of that Ordinance to courts established under the Magistrates' Courts (Northern Region) Law, 1955.

Egwurube *v* Inspector-General of Police
(1957) N.R.N.L.R. 102 (C.A.)

Grounds of appeal—Additional grounds—Application for extension of time in which to file additional grounds of appeal—Powers of High Court of the Northern Region—Section 58 Northern Region High Court Law, 1955—Whether 'enlarge' includes 'extend'.

Okoronkwo *v* Inspector-General of Police
(1957) N.R.N.L.R. 124 (F.S.C.)

Native Court to High Court—Homicide—Conviction for intentional homicide in Moslem court—Sentence of death—Powers of the High Court of the Northern Region where there is evidence upon the record which suggests manslaughter under the Criminal Code—Section 67 Native Courts Law, 1956—Section 67(2)—Section 10A Native Courts Ordinance (Cap. 142).

Fagoji *v* Kano Native Authority
(1957) N.R.N.L.R. 57 (C.A.)

Jalo T'samiya *v* Bauchi Native Authority
(1957) N.R.N.L.R. 73 (F.S.C.)

Fagoji *v* Kano Native Authority
(1957) N.R.N.L.R. 84 (F.S.C.)

Mamman Tungar Maizabo *v* Sokoto Native Authority
(1957) N.R.N L.R. 133 (F.S.C.)

CRIMINAL LAW, PROCEDURE AND EVIDENCE

Accomplices—Corroboration—Accused incriminating co-accused—Whether corroboration required—Section 177(2) Evidence Ordinance (Cap. 63).

R. *v* Onuegbe, (1957) N.R.N.L.R. 126 (F.S.C.)

Attempt—Conviction for attempted stealing—Act which manifests an intention to steal is not sufficient—Necessity for proof of some act which is so connected with the offence of stealing that it shows that the accused has begun to put his intention into execution—Section 4 Criminal Code (Cap. 42).

Orija *v* Inspector-General of Police
(1957) N.R.N.L.R. 189

Autrefois acquit—Accused committed for trial before High Court after acquittal in the native court—Case transferred from native court under 28(1)(*b*) Native Courts Ordinance (Cap. 142)—Accused pleading 'not guilty' upon arraignment—No plea in bar but counsel raising defence in the course of his final address.

R. *v* Usuman Pategi, (1957) N.R.N.L.R. 47
(High Court—Smith, J.)

Discharge of accused at close of prosecution case—No case to answer—Whether an acquittal for purposes of subsequent plea in bar—Effect of sections 181, 185, and 301 Criminal Procedure Ordinance (Cap. 43).

Inspector-General of Police *v* Marke
(1957) N.R.N.L.R. 89 (C.A.)
(1957) N.R.N.L.R. 97 (F.S.C.)

Plea in bar raised before plea to the general issue—Court treating plea in bar as point of law to be decided after plea to the general issue—Section 181 Criminal Procedure Ordinance (Cap. 43).

Ogenyi *v* Inspector-General of Police
(1957) N.R.N.L.R. 140 (C.A.)

Bail—Application for bail after conviction and pending appeal—Not to be granted except in 'special circumstances'—Section 99(4) Magistrates' Courts (Northern Region) Law, 1955.

Adamu Muri *v* Inspector-General of Police
(1957) N.R.N.L.R. 5 (C.A.)

Bribery under section 116 and extortion under section 406 Criminal Code (Cap. 42)—Whether same transaction may constitute both offences.

Ebute *v* Inspector-General of Police
(1957) N.R.N.L.R. 194 (C.A.)

Duplicity—'Assaulting, resisting, or obstructing a police officer'—Charge naming two police officers and other members of the police force'—Effect—Sections 152(1) and 154(5) Criminal Procedure Ordinance (Cap. 43).

Ogenyi *v* Inspector-General of Police
(1957) N.R.N.L.R. 140 (C.A.)

Variation—Altering charge after plea—Substituting new counts for some only of the original counts—Striking out original counts—Section 163 Criminal Procedure Ordinance (Cap. 43).

Elumelu *v* Inspector—General of Police
(1957) 17 N.R.N.L.R. (C.A.)

Compensation order made by native court for payment of compensation in criminal proceedings—Sum awarded paid into court but not taken out—Section 20 Native Courts Ordinance (Cap. 142)—Subsequent action for damages in magistrate's court—Whether action barred.

Chimezie *v* Dike, (1957) N.R.N.L.R. 43 (C.A.)

Course of justice—Attempt to defeat contrary to section 126(2) Criminal Code (Cap. 42)—Aim of subsection—Begging prosecuting officer for help—Intention—Acquittal in case for which prosecuted—Whether relevant—Meaning of particulars "In order that he might hide the facts in the charges"

Onyirokwu *v* Inspector-General of Police
(1957) N.R.N.L.R. 104 (C.A.)

Accomplices—Accused giving evidence on his own behalf and incrimination co-accused—Whether corroboration required—Section 177(2) Evidence Ordinance (Cap. 63).

R. *v* Onuegbe, (1957) N.R.N.L.R. 126 (F.S.C.)

Insanity—Burden of proof—Section 28 Criminal Code (Cap. 42).

R. *v* Yayiye of Kadi Kadi, (1957) N.R.N.L.R. 207
(High Court—Reed, J.)

Demanding property contrary to section 406 Criminal Code (Cap. 42)—Demanding money in order to refrain from searching house under a warrant—Intent to steal—'Without the consent of the owner'—These words not appearing in the Criminal Code of Nigeria—Consent—whether Voluntary.

Yusufu Tudun Wada *v* Inspector-General of Police
(1957) N.R.N.L.R. 1 (C.A.)

Treasurer receiving money to pay on false certificate—Whether 'corruptly'.

Ameh *v* Inspector-General of Police
(1957) N.R.N.L.R. 28 (C.A.)

Homicide—Defence of insanity—Burden of proof—Section 28 Criminal Code (Cap. 42)—English law distinguished—Standard of proof required—'Most probable'.

R. *v* Yayiye of Kadi Kadi, (1957) N.R.N.L.R. 207
(High Court—Reed, J.)

Insanity—Burden of proof—Section 28 Criminal Code (Cap. 42)—English law distinguished—Standard of proof—'Most probable'.

R. *v* Yayiye of Kadi Kadi, (1957) N.R.N.L.R. 207
(High Court—Reed, J.)

Burden of proof—Negative averment—Procession in defiance of section 36 Police Ordinance (Cap. 172)—Proof of licence.

Joseph *v* Inspector-General of Police
(1957) N.R.N.L.R. 170 (C.A.)

Extortion distinguished—Whether same transaction may constitute both an offence under section 116 and one under section 406 of the Criminal Code (Cap. 42).

Ebute *v* Inspector-General of Police
(1957) N.R.N.L.R. 194 (C.A.)

Meaning of the words 'with a view to corrupt or improper interference with the administration of justice'—Whether the commission of an actual offence is material.

Ebute *v* Inspector-General of Police
(1957) N.R.N.L.R. 194 (C.A.)

Obstruction of a police officer in the execution of his duty—Section 356(2) Criminal Code (Cap. 42)—Advising arrested person not to make a statement—Whether such conduct amounts to obstruction.

Onobu *v* Inspector-General of Police
(1957) N.R.N.L.R. 25 (C.A.)

Charge—Assaulting, resisting or obstructing a police officer in the execution of his duty—section 356(2), Criminal Code (Cap. 42)—Count naming two police officers and 'other members of the police force'—Whether duplicity.

Ogenyi *v* Inspector-General of Police
(1957) N.R.N.L.R. (C.A.)

Plea—Autrefois acquit—Discharge of accused at close of prosecution case—No case to answer—Whether such discharge amounts to an acquittal for the purposes of a subsequent plea in bar.

Inspector-General of Police *v* Marke
(1957) N.R.N.L.R. 89 (C.A.)
(1957) N.R.N.L.R. 97 (F.S.C.)

Autrefois acquit—Plea in bar raised before plea to the general issue treated by court as a point of law to be determined after plea to the general issue.

Ogenyi *v* Inspector-General of Police
(1957) N.R.N.L.R. 140 (C.A.)

Autrefois convict—Time for raising plea in bar—Section 221, Criminal Procedure Ordinance (Cap. 43).

Inspector-General of Police *v* Ighoroji
(1957) N.R.N.L.R. 182 (C.A.)

Withdrawal of plea—Right of accused person to withdraw plea at any stage before judgment—Purpose of withdrawal.

Inspector-General of Police *v* Ighoroji
(1957) N.R.N.L.R. 182 (C.A.)

Police Officer—Assaulting, resisting or obstructing a police officer in the execution of his duty—Charge naming two police officers and 'other members of the police force'—Whether duplicity—Sections 152(1) and 154(5), Criminal Procedure Ordinance (Cap. 43).

Ogenyi *v* Inspector-General of Police
(1957) N.R.N.L.R. 140 (C.A.)

Obstructing a police officer in the execution of his duty—Section 356(2) Criminal Code (Cap. 42)—Accused advising arrested person not to make a statement to the police.

Onobu *v* Inspector-General of Police
(1957) N.R.N.L.R. 25 (C.A.)

Jurisdiction of Magistrate, Grade I—Consecutive sentences—Section 380 Criminal Procedure Ordinance (Cap. 43)—Whether sentences passed by a magistrate of this grade are limited to an aggregate of imprisonment for two years—Distinction between section 20(*a*), Magistrates' Courts (Northern Region) Law, 1955 and section 20, Magistrates' Courts (Appeals) Ordinance now repealed.

Quartey *v* Inspector-General of Police
(1957) N.R.N.L.R. 38 (C.A.)

Unlawful or riotous assembly—Section 69, Criminal Code (Cap. 42)—Casual crowd misbehaving—Intent.

Ogenyi *v* Inspector-General of Police
(1957) N.R.N.L.R. 140 (C.A.)

Unlawful procession contrary to section 38(*a*), Police Ordinance (Cap. 172)—Burden of proving licence to hold procession.

Joseph *v* Inspector-General of Police
(1957) N.R.N.L.R. 170 (C.A.)

DEBT

Debt—Appropriation of payments to specific portions of the debt—Notification of intention—How intention to be gauged in the absence of such notification.

Societe Commerciale de L'Ouest Africain *v* Obi
(1957) N.R.N.L.R. 85 (High Court—Smith, J.)

DEEDS AND OTHER INSTRUMENTS

Irrevocable power of attorney for valuable consideration—Whether equivalent to assignment—Section 8, Conveyancing Act, 1882.

Ejukorlem and Co. *v* Chief Inspector of Mines
(1957) N.R.N.L.R. 200 (C.A.)

DETINUE

Road traffic offence—Power of police to hold and retain article found in possession of person to be prosecuted—Wheel with tyre attached.

Nwagu *v* Lawal Wawa, (1957) N.R.N.L.R. 187 (C.A.)

EVIDENCE

Documentary evidence—Secondary evidence of documents—Notice to produce—Sections 96(1)(*a*) and 97 Evidence Ordinance (Cap. 63).

Iphie *v* Plateau Auditing Co.
(1957) N.R.N.L.R. 212 (C.A.)

EXECUTION

Motion for issue of execution against immovable property of debtor—Section 43, Sheriffs and Enforcement of Judgments and Orders Ordinance (Cap. 205)—Order IV, rule 16(2), Judgments (Enforcement) Rules—Meaning of 'reasonable diligence'.

Mutual Aid Society Ltd. *v* Ogonade
(1957) N.R.N.L.R. 118 (High Court—Hurley, J.)

HIGH COURT OF THE NORTHERN REGION

Application for extension of time in which to file additional grounds of appeal —Application made after prescribed time had expired—Definition of 'Magistrate's Court' in section 2 Magistrates' Courts (Appeals) Ordinance—Application of section 36 of that ordinance to courts established under Magistrates' Courts (Northern Region) Law, 1955—Powers of High Court.

Egwurube *v* Inspector-General of Police
(1957) N.R.N.L.R. 102 (C.A.)

Application for extension of time in which to file additional grounds of appeal—Section 58, Northern Region High Court Law, 1955—Powers of High Court—whether 'enlarge' includes 'extend'.

Okoronkwo *v* Inspector-General of Police
(1957) N.R.N.L.R. 124 (F.S.C.)

LANDLORD AND TENANT

Right of occupancy for a term of years—Nature of such right—Certificate of occupancy containing proviso for re-entry—Proviso similar to that contained in a lease—Revocation of grant under section 12(*a*), Land and Native Rights Ordinance (Cap. 105)—Determination of lease under proviso—Mode of revocation—Signification—Section 47(2)(*a*), Interpretation Ordinance (Cap. 94).

Majiyagbe *v* Attorney-General (1957) N.R.N.L.R. 158 (C.A.)

Sublease—Consent of Resident—Sublease under written agreement—Expiry of agreement—Tenant exercising option to renew for term of three years;—Plaintiff refusing to accept rent—Notice to Quit—Validity of notice—Increase of Rent (Restriction) Ordinance (Cap. 93)—Section 7(*ii*), Recovery of Premises Ordinance (Cap. 193).

Lasaki *v* Dabian, (1957) N.R.N.L.R. 13
(High Court—Smith, J.)

MAGISTRATES' COURTS OF THE NORTHERN REGION

Magistrate, Grade I—Powers—Consecutive sentences—Section 380, Criminal Procedure Ordinance (Cap. 43)—Whether magistrate of this grade limited to passing an aggregate of imprisonment for two years—Distinction between

section 20(*a*), Magistrates' Courts (Northern Region) Law, 1955 and section 20, Magistrates' Courts (Appeals) Ordinance now repealed.

Quartey *v* Inspector-General of Police
(1957) N.R.N.L.R. 38 (C.A.)

MINES AND MINERALS

Unlawful possession of controlled minerals—Lessee of mining lease—Possessor holding irrevocable power of attorney given by lessee for valuable consideration—Consent of Governor not obtained—Whether possessor of minerals lessee or agent of lessee—Whether power of attorney amounted to an assignment—Section 8, Conveyancing Act, 1882—Sections 2 and 13 Minerals Ordinance (Cap. 134)—Sections 66(*a*) and 66(*d*).

Ejukorlem and Co. Ltd, *v* Chief Inspector of Mines
(1957) N.R.N.L.R. 200 (C.A.)

MOSLEM LAW

Cin mutunci—Definition of offence—*Kazafi* distinguished.

Tafida dan Iska *v* Abdu Dabi (1957) N.R.N.L.R. 168 (C.A.)

Evidence—Burden of proof—Presumption of innocence—Duty of accuser to prove his accusation.

Goni Kinnami *v* Bornu Native Authority
(1957) N.R.N.L.R. 40 (C.A.)

Dying declaration giving rise to '*lausu*'—Kasama oaths taken—Retrial ordered by appeal court—Failure to take Kasama oaths again—Whether the evidence was sufficient.

Kawule dan Tukur Indabo *v* Kano Native Authority
(1957) N.R.N.L.R. 33 (C.A.)

Requirement of two witnesses to an act—No eye-witnesses forthcoming—Mere suspicion—Procedure.

Duru *v* Gumel Native Authority (1957) N.R.N.L.R. 151 (C.A.)

Haddi and *siyasa* offences—Procedure as to taking of an oath distinguished—Chief Alkali confusing the procedure in the two systems.

Tafida dan Iska *v* Abdu Dabi (1957) N.R.N.L.R. 168 (C.A.)

Intentional homicide (*amdu*)—Dying declaration giving rise to '*lausu*'—Retrial ordered by appeal court—Failure to take requisite Kasama oaths at second trial although taken at first trial—Effect of such omission.

Kawule dan Tukur Indabo *v* Kano Native Authority
(1957) N.R.N.L.R. 33 (C.A.)

Proof—Necessity for proof that death of victim caused by accused—Lapse of time following upon assault.

Ardo Yahaya Mayo Haka *v* Adamawa Native Authority
(1957) N.R.N.L.R. 113 (C.A.)

Kazafi or defamation—*Haddi* offence—*Siyasa* offence of *cin mutunci* distinguished.

Tafida dan Iska *v* Abdu Dabi, (1957) N.R.N.L.R. 168 (C.A.)

Procedure—Case sent up from Junior to Chief Alkali—Observations of appeal court on procedure.

Dan Azumi *v* Bauchi Native Authority
(1957) N.R.N.L.R. 105 (C.A.)

Constitution of court altered during hearing—Seven members present on first day of trial and only four on the following day—Whether any substantial difference between Moslem and English law upon the matter.

Mai Rai *v* Bauchi Native Authority (1957) N.R.N.L.R. 31 (C.A.)

Forum—Charge of abusing alkalai generally—Case heard by Chief Alkali—Proper forum in such a case.

Yakubu Bauchi *v* Bauchi Native Authority
(1957) N.R.N.L.R. 156 (C.A.)

Need for complainant—Articles found in possession of prisoner during trial—Alkali convicting and passing sentence in respect of possession of those articles.

Duru *v* Gumel Native Authority (1957) N.R.N.L.R. 121 (C.A.)

Oath put to the defendants after witnesses of complainant found unacceptable—Distinction between *haddi* and *siyasa* offences.

Tafida dan Iska *v* Abdu Dabi (1957) N.R.N.L.R. 168 (C.A.)

Oath—Kasama oaths taken at trial owing to evidence giving rise to state of '*lausu*'—Retrial ordered by appeal court—Kasama oaths not taken again—Whether sufficient evidence.

Kawule dan Tukur Indabo *v* Kano Native Authority
(1957) N.R.N.L.R. 33 (C.A.)

Stealing—Keeping money—No finding of intention to steal.

Sangari *v* Bauchi Native Authority, (1957) N.R.N.L.R. 108 (C.A.)

No evidence of eye-witnesses to the act—Mere suspicion—Oath proffered to complainant—Whether correct procedure.

Duru *v* Gumel Native Authority, (1957 N.R.N.L.R. 151 (C.A.)

No evidence of ownership of the property which was alleged to be stolen.

Dan Azumi *v* Bauchi Native Authority
(1957) N.R.N.L.R. 105 (C.A.)

NATIVE COURTS

Powers of High Court on appeal—Homicide case—Conviction of intentional homicide according to Moslem law—Sentence of death—Powers of the High Court where the record discloses evidence of manslaughter under the Criminal Code—Section 10A Native Courts Ordinance (Cap. 142)—Section 67 Native Courts Law, 1956.

Fagoji *v* Kano Native Authority, (1957) N.R.N.L.R. 57 (C.A.)

Jalo Tsamiya *v* Bauchi Native Authority
(1957) N.R.N.L.R. 73 (F.S C.)

Fagoji *v* Kano Native Authority
(1957) N.R.N.L.R. 84 (F.S.C.)

Maniman Tungar Maizabo *v* Sokoto Native Authority
(1957) N.R.N.L.R. 133 (C.A.)

Constitution of court altered during trial—Seven members sitting on the first day and only four on the second.

Mai Rai *v* Bauchi Native Authority, (1957), N.R.N.L.R. 31 (C.A.)

Trial of non-Moslem in Moslem court—Order-in-Council made under section 8 Native Courts Ordinance (Cap. 142).

Effiong Ekpo *v* Kano Native Authority
(1957) N.R.N.L.R. 129 (C.A.)

Order lawful by law of native court is not 'contrary to natural justice' merely because it is contrary to the Common Law of England—English Common Law is not to be equated with natural justice.

Rufai *v* Igbirra Native Authority, (1957), N.R.N.L.R. 178 (C.A.)

Record—Purported record of proceedings not taken contemporaneously with trial—Attitude of appeal court.

Effiong Ekpo *v* Kano Native Authority
(1957) N.R.N.L.R. 129 (C.A.)

Retrial ordered—Record of first trial used as basis for record of retrial.

Mai Rai *v* Bauchi Native Authority
(1957) N.R.N.L.R. 115 (C.A.)

PRACTICE AND PROCEDURE

Application for the evidence of a witness to be taken prior to the hearing—Order XIII, rule 2, Supreme Court (Civil Procedure) Rules.

Dabiri *v* Dabiri, (1957) N.R.N.L.R. 121
(High Court—Hurley, J.)

Counterclaim filed in the High Court without notice—Order XXVI, rule 4(*a*), Supreme Court (Civil Procedure) Rules.

Elliott Saville and Co. *v* Ibrahim Lansari, (1957) N.R.N.L.R. 165
(High Court—Smith, J.)

Defence in Magistrate's Court—Need for detailed defence—Order XXII, rule 1, Magistrates' Courts (Northern Region) Rules, 1955.

Iphie *v* Plateau Auditing Co., (1957) N.R.N.L.R. 212 (C.A.)

Execution—Application for issue of execution against immovable property where no movable property can be found—Order IV, rule 16(2)(*c*), Judgments (Enforcement) Rules—Meaning of 'reasonable diligence'.

Mutual Aid Society Ltd. *v* Ogonade, (1957) N.R.N.L.R. 118
(High Court—Hurley, J.)

Pleadings—Counterclaim filed without notice—Order XXVI, rule 4(*a*), Supreme Court (Civil Procedure) Rules.

Elliott Saville and Co. *v* Ibrahim Lansari, (1957) N.R.N.L.R. 165
(High Court—Smith, J.)

Defence—Need for detailed defence in Magistrate's Court—Order XXII, rule 1, Magistrates' Courts (Northern Region) Rules, 1955.

Iphie *v* Plateau Auditing Co., (1957) N.R.N.L.R. 212 (C.A.)

Order for pleadings made by judge in court—Whether any power in judge to set pleadings aside—*Aliter* if order was made by judge in chambers.

Commissioner of Income Tax *v* Nigeria Oil Mills Ltd.
(1957) N.R.N.L.R. 111 (High Court—Smith, J.)

ROAD TRAFFIC

"Commercial vehicle"—Section 2, Road Traffic Ordinance (No. 43 of 1947)—Vehicle used exclusively for carrying the personal effects of its owner—Meaning of "personal effects"—"Goods" distinguished.

Stock *v* Commissioner of Police, (1957) N.R.N.L.R. 198 (C.A.)
Obstruction of the public highway—Obstruction by means of mud and stones—Whether falling within the purview of regulation 39(3), Road Traffic Regulations, 1947—

Okeke *v* Inspector-General of Police
(1957) N.R.N.L.R. 23 (C.A.)

Powers of Police officer to hold and retain articles which might be needed in prosecution of offender—Regulation 44(*e*), Road Traffic Regulations, 1947—Power to detain wheel upon which defective tyre is mounted.

Nwagu *v* Lawal Wawa, (1957) N.R.N.L.R. 187 (C.A.)

Suspension of driving licence—Obstruction of the public highway—Whether section 8, Road Traffic Ordinance (No. 43 of 1947) confines suspension to offences connected with the actual driving of a vehicle.

Okeke *v* Inspector-General of Police, (1957) N.R.N.L.R. 23 (C.A.)

TRESPASS TO LAND

Claim for damages for trespass to land—No proof of physical entry by defendants.

Rufai *v* Igbirra Native Authority, (1957) N.R.N.L.R. 178 (C.A.)

YUSUFU TUDUN WADA AND ANOTHER *v* INSPECTOR-GENERAL OF POLICE

[C.A. (Bairamian S.P.J., Anderson Ag. J) October 10, 1956]

[Jos—Criminal Appeal No. JD/89A/1956]

Criminal Law—Demanding property under s. 406 Criminal Code—Demanding money in order to refrain from searching house under warrant—intent to steal—'without the consent of the owner'—Words not appearing in the Criminal Code of Nigeria—Consent—Whether voluntary.

The two appellants appeared before the Magistrate at Jos charged with an offence under section 406 Criminal Code. The facts were that the first appellant who was a police constable, together with the second appellant who was a civilian, demanded money from a witness lest they should search his house under a search warrant, and take him, the occupier, to the police station. In order to avoid the inconvenience of that course, the witness paid £10 to the appellants. Upon this evidence the Magistrate convicted both appellants. On appeal, it was contended on their behalf that the evidence if it disclosed any offence at all disclosed an offence of obtaining money by false pretences, for the warrant was false. Secondly it was said that there was no 'intent to steal' as required by the section under which they were charged, for the money was not obtained 'without the consent of the owner'.

Held:

(1) That there was no evidence that the warrant was false, and there was no evidence upon which to found a charge of false pretences.

(2) That an 'intent to steal' is an essential element of an offence under section 406 Criminal Code.

(3) That although the words 'without the consent of the owner' do not appear in the definition of stealing contained in section 383 Criminal Code, the absence of consent is implicit in that section.

(4) That consent in such circumstances must be voluntary consent, free from any menace 'of such a nature as to unsettle the mind of the person upon whom it operates, and to take away from his acts that element of voluntary action which constitutes consent'.

(5) That there was no such voluntary consent in this case.

Wada and another v I.G.P. Bairamian S.P.J.

Cases referred to:

Rex v Bernard 26 Cr. App. R. 137 applied:

Rex v Walton 9 Cox C.C. 268; L. and C. 288, followed:

Rex v Robertson L. and C. 483; 10 Cox C.C. 9 applied.

CRIMINAL APPEAL

Eso for the appellants.

Bello, Crown Counsel, for the respondent.

Bairamian, S.P.J. (delivering the judgment of the Court): This is an appeal from the decision of J.P. Smith, Esquire, Magistrate Grade I at Jos who on the 1st June, 1956 convicted the two appellants of an offence under section 406 of the Criminal Code, which provides that—

> "Any person who, with intent to steal anything, demands it from any person with threats of any injury or detriment of any kind to be caused to him, either by the offender or by any other person, if the demand is not complied with, is guilty of a felony, and is liable to imprisonment for three years."

The learned Magistrate accepted the account of the prosecution witnesses as correct—"that a demand was made for money from prosecution witness lest his house be searched and he be taken to the Police Station and that a payment of £10 was made by him to the two accused on 15th January". The first appellant was a policeman; the second appellant, who helped him in the matter, was a civilian. Mr Eso, who appeared for them, did not dispute that finding of fact. He raised two points, which may be described as points of mixed law and fact.

The first point is that, if anything, this was a case of obtaining money by false pretences, on the ground that the warrant of search was false. I cannot find any pronouncement by the learned Magistrate that the warrant was false. In the ruling he gave at the end of the case for the prosecution he says this:—

> "I do not know if this was a genuine warrant or not—Prosecution witness eight says that so far as he knew there was no record in his office of the existence of a search warrant, but I understand him to be a prosecutor, not an investigator: four witnesses saw the warrant and I take it that they assumed it was genuine: they assumed that 1st accused, who was known to be a constable, was performing his duty, and therefore the money was paid to avoid the inconvenience of a search."

The learned Magistrate does not advert to the genuineness or falsity of the warrant in the reason given by him for his decision at the close of the case; but he does note and say that he accepts as true the following piece of evidence from the testimony of prosecution witness:

> "if I could not produce the money he (namely the first appellant) would search my house and take me to the police station."

That the learned Magistrate considered as a demand with a threat of detriment, and his view has not been contested.

The point pressed on us by Mr Eso is that there was no intent to steal, on the ground that the taking of the money was not *invito domino*.

These words—"without the consent of the owner"—which occur in the definition of the offence of larceny in section 1 (1) of the Larceny Act, 1916, do not occur in the definition of stealing in section 383 of our Criminal Code, which is—

> "(1) A person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing.
>
> (2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents:—
>
> (*a*) an intent permanently to deprive the owner of the thing of it;" etc.

There is no doubt but that the appellants, when taking the £10 from prosecution witness 1, intended to deprive him of them permanently; therefore they took the money fraudulently and were guilty of stealing it; they could have been prosecuted for stealing the £10 from that witness, and they could have been convicted of that offence. I have applied this test to the case deliberately, in view of what was said by the Court of Criminal Appeal in *Rex v Bernard* 26 Cr. App. R., 137, at page 145, with reference to section 30 of the Larceny Act, which is similar to our section 406: that section 30 reads thus:

> "Every person who with menaces or by force demands of any person anything capable of being stolen with intent to steal the same shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding five years."

The Court said in the case of *Rex v Bernard* (at page 145)—

> "The test is whether, if the money had been obtained, it would have been in such circumstances that it could properly be said to have been stolen: see WALTON (1863) 9 Cox 268."

As intent to steal is an ingredient in our section 406, as it is in the English section; that test applies in Nigeria also, provided of course that a case in Nigeria is viewed in the light of its own law of stealing.

Wada and another v I.G.P.

Bairamian S.P.J.

Although our section 383 on stealing does not mention the consent of the owner, I think that its absence is implied; for a court would not, I venture to say, convict A of stealing a pound from B if he took it with the consent of B that it should become the property of A; for in such a case it would cease to be the property of B, who could no longer be regarded as the owner of the pound, and therefore A could not be said "to deprive the owner" of it. The consent must, however, be a true consent, that is to say a consent that is voluntary, free from any menace "of such a nature as to unsettle the mind of the person upon whom it operates, and to take away from his acts that element of voluntary action which constitutes consent", as it is put in Archbold (1949) at page 672 on the authority of *Rex v Walton*, 9 Cox 268; L. and C. 288. The learned Magistrate wrote this in his judgment:

> "Where a policeman, professing to act under legal authority threatens to imprison a person on a charge not amounting to an offence in law, unless money be given him, and the person believing him gives him money, the policeman may be indicted under this section (viz. section 30 of the Larceny Act, 1916) although he might also have been indicted for stealing the money: *Rex v Robertson.*"

In the present case the threat which made prosecution witness 1 give £10 was that, unless he gave the money, the first appellant would search his house and take him to the Police Station. We agree with the learned Magistrate that an offence under section 406 was committed; the appeal is dismissed.

Appeal dismissed.

ADAMU MURI *v* INSPECTOR-GENERAL OF POLICE

[C.A. (Sir Algernon Brown C.J., Smith J.) October 24, 1956]

[Kano—Criminal Appeal No. K/53/1956]

Bail—Convicted Prisoner—Principles upon which bail is granted after conviction—'special circumstances'—s. 99 (4) *Magistrates' Courts (Northern Region) Law*, 1955.

The appellant was convicted of receiving stolen goods before the Magistrate Grade I at Kano. Upon giving verbal notice of appeal, Counsel applied for bail pending the hearing of the appeal, but this application was refused.

Held:

That there were no special circumstances in this case which would justify the granting of bail after conviction.

Cases referred to:

Rex v Duke of Leinster 17 Cr. App. R. 147 considered;

Rex v Starkie 24 Cr. App. R. 1 considered.

APPLICATION FOR BAIL

Nwajei (with him *Adewale*, *Hughes*, and *Lewis Thomas*) for the applicant.

Bail upon conviction is granted upon the same principles as before conviction. Bail automatic after conviction where conditions are fulfilled. *Commissioner of Police versus Idowu*—W.A.C.A. 1951 February Cyclostyled Reports page 5.

[*Smith, J.*: That is a report dealing with the law as it was before it was changed by the Magistrates' Courts (Amendment) Law, 1956. It is of no value to cite it in this case].

Appellant is a well known trader and there is no reason to suppose that he will abscond. Purpose of bail is that accused appears at the hearing. The Magistrate would not have imposed conditions of appeal had he not intended to release the appellant on bail at a later stage.

McLean, *Crown Counsel*, for the respondent.

Old Law laid down in section 24 (5) Magistrates' Courts (Appeals) Ordinance Cap. 123. Mandatory provisions of this section re-enacted in section 99 (4) Magistrates' Courts (Northern Region)

Muri
v
I.G.P.
Brown C. J.

Law, 1955. Law amended by Magistrates' Courts (Amendment) Law, 1956, which provides that in this Region, the granting of bail after conviction is now in the discretion of the Magistrate. It is submitted that position in this Region is now as under Criminal Appeal Act, 1907, in England. Bail after conviction is governed by entirely different considerations from the granting of bail before conviction. After conviction it is only granted upon the appellant showing some 'unusual or exceptional circumstance' for granting it.

Rex v Gordon 7 Cr. App. R. 182; *Rex v Gott* 16 Cr. App. R. 86; *Rex v Wise* 17 Cr. App. R. 17; *Rex v Duke of Leinster* 17 Cr. App. R. 147; *Rex v Selkirk* 18 Cr. App. R. 172; *Rex v Davidson* 20 Cr. App. R. 66; *Rex v Klein* 23 Cr. App. R. 173; *Rex v Starkie* 24 Cr. App. R. 1; *Rex v Howeson and Hardy* 25 Cr. App. R. 152. Immaterial that appellant a man of substance, unlikely to abscond or can find substantial sureties. No unusual or exceptional circumstance shown.

Brown, C.J. (delivering the ruling of the Court): As Mr Nwajei has frankly said, this motion is largely academic because the appeal is likely to come on either today or tomorrow. Nevertheless the motion provides a useful opportunity of explaining the position regarding bail after conviction since the law was altered, about which there appears to be a good deal of misunderstanding.

Mr Nwajei said that the principle of granting bail after conviction is the same as that of granting bail before conviction. Nothing could be further from the truth. Before conviction there is a presumption of innocence. After conviction the person convicted has no right at all to bail. It is within the magistrate's discretion to grant it; but he has to exercise that discretion judicially and in accordance with established principles. And the principle upon which bail may be granted after conviction is that it should not be granted unless there are special circumstances which makes it right that it should be granted. We do not propose to suggest in this judgment a set of circumstances which would justify the granting of bail after conviction because each case must be decided on its merits. Learned Crown Counsel has referred to nine cases which show the circumstances in which bail was not granted. We will refer to two of them only as giving an example of circumstances in which bail should not be granted after conviction. We refer to the case of *Rex v Duke of Leinster*, 17 Cr. App. R. 147, and *Rex v Starkie*, 24 Cr. App. R. 1, which show that the fact that the man has received a short sentence which is likely to expire before the appeal comes on is not of itself a special circumstance which would justify the granting of bail after conviction. It might be a factor to take into account with a number of other factors, including

for example the factor that the learned magistrate was not free from doubt that his decision upon a point of law had been correct; but standing by itself the fact that the appeal will not come on until the sentence has expired will afford no ground for granting bail after conviction.

Unlike one or two of the cases which have been cited we do not propose to say anything about the facts or prospects of this particular appeal for the reason that we are so shortly about to hear it. It is sufficient to say that there were not, and are not now, any special circumstances in this case which would have justified the granting of bail after conviction and the application is dismissed.

Application dismissed.

EMMANUEL UMOLE AND ANOTHER *v* INSPECTOR-GENERAL OF POLICE

[C. A. (Sir Algernon Brown C. J., Smith J.) September 22, 1956]
[Kano—Criminal Appeal No. K/29A/1956]

Criminal Law—Accomplice—Corroboration—Co-accused pleading guilty and giving evidence against other accused—Desirability of his being sentenced before giving evidence—Whether failure to take this course vitiates conviction of other accused.

The appellants were charged together with one Suleiman Arab with stealing the sum of £100 from Barclays Bank at Gusau. Suleiman Arab, who pleaded guilty, was then called as a witness for the prosecution in the trial of the two appellants, and it was essentially upon his evidence that the appellants were convicted. The normal practice, as in England, of passing sentence upon him before he gave his evidence was not followed. On appeal it was contended *inter alia* that Suleiman Arab was an accomplice, that as such his evidence ought to have been corroborated and that there was in fact no corroboration. It was further argued that the failure of the Magistrate to sentence Suleiman before he gave evidence for the prosecution was fatal to the conviction.

Held:

(1) That Suleiman was rightly regarded as an accomplice; and that the Magistrate did so regard him.

(2) That his evidence was amply corroborated by the evidence of the appellants themselves.

(3) That where one accused pleads guilty and is to be called as a witness for the prosecution, the proper course is that he be sentenced at once so that there should be no suspicion that his evidence may be coloured by the hope of getting a lighter sentence by the evidence he gives.

(4) That although that procedure was not followed in this case, Suleiman was a competent witness for the prosecution and the conviction was not vitiated thereby.

Cases referred to:

Rex v Payne 34 Cr. App. R.43 approved:

Commissioner of Police v Kemavor 7 W.A.C.A. 198 distinguished;

Winsor v The Queen (1866) L.R.Q.B. 289, 390; 10 Cox C.C. 327; 35 L.J.M.C. 121, 161 applied;

Akereusi v Inspector-General of Police (unreported) Kano Sessions 13th January, 1956, followed.

Umole v I.G.P.
Brown C. J.

CRIMINAL APPEAL

Shyngle for the first appellant.

Nwajei for the second appellant.

McLean, Crown Counsel, for the respondent.

Brown, C. J. (delivering the judgment of the Court): The two appellants were charged, with one Suleiman Arab, with stealing the sum of £100 in florins from Barclays Bank, Gusau, on the 30th March. All three men were employed by the Bank. Suleiman Arab was a messenger; and the two appellants were clerks. March 30th was Good Friday and a bank holiday. The Manager, with some other members of the staff, worked in the Bank in the morning and left just before 1 p.m. When he left, the two appellants and Suleiman Arab were the only persons left on the premises. The inner door of the strong room was locked, and the Manager is the only person who keeps the keys. In it there is a grille which is not large enough to allow a full bag of coins to be extracted. But, by an experiment conducted after the crime had been committed, it was found that it is possible for a person to open a bag of coins inside the strong-room by inserting his hands through the grille and either removing the coins by handfuls, or by pouring them slowly into another bag until it is half full, and then extracting both bags through the grille. The key of the front door of the Bank is kept by the Manager; and there is only one duplicate key which is kept by the first appellant. When the Manager returned at 3 p.m. he found the Bank locked up. Letting himself in with his key, he found that the outer door of the strong-room, which he had left open, had been pushed to. He locked it; and on checking the strong-room at the close of business next day the loss was discovered.

Suleiman Arab pleaded guilty and his sentence was deferred until the end of the trial of the appellants who pleaded not guilty. He was then called as a witness for the prosecution immediately after the Manager. He described the part which the two appellants took in the commission of the crime. He was clearly—and rightly—regarded as an accomplice; and his evidence was corroborated by the appellants' own evidence, which was to the effect that (*a*) they all left the Bank at about 2.30, the first appellant locking the door; (*b*) that from the time when the Manager left, just before 1 p.m., the three accused were the only persons in the Bank.

The only ground of appeal which has any substance is that Suleiman Arab ought to have been sentenced before he was called as a

Umole
v
I.G.P.
Brown C. J.

witness for the prosecution. It is clear from the case of *Rex v Payne* (34 Cr. App. R. 43) that where one accused, who is jointly indicted with others, pleads guilty and is to be called as a witness for the prosecution the normal practice of standing him down to come up for sentence at the conclusion of the trial of his co-accused who have pleaded not guilty ought not to be followed, and that he ought to be sentenced at once so that there should be no suspicion that his evidence may be coloured by the hope of getting a lighter sentence because of the evidence which he gives. That should have been done in this case. And we have to consider whether the fact that he was called as a witness before he was sentenced vitiates the convictions of the two appellants. The appellants rely on the case of *Commissioner of Police v Kemavor* (7 W.A.C.A. 198). In that case five persons were charged. The first and the second pleaded not guilty. The third, fourth and fifth accused pleaded guilty. The prosecution called the fifth accused as a witness. After giving his evidence-in-chief he changed his plea of guilty to one of not guilty. He was then cross-examined and re-examined.

The clear distinction between *Commissioner of Police v Kemavor* and the present case is that when the fifth accused in *Kemavor's* case changed his plea he became a person who was on trial. He was then no longer a competent witness for the prosecution, and the evidence which he had already given should have been expunged from the record and disregarded. But in the present case unless Suleiman Arab was being *tried* jointly with the appellants, he was a competent witness for the prosecution throughout. *Winsor v The Queen* (1866 L.R.Q.B. 390) is authority for the proposition that one accused may give evidence against a co-accused, although jointly *indicted*, provided he is not being *tried* with the accused against whom he gives evidence. And it seems to us that the point contained in this ground of appeal is reduced to the sole question of whether Mr Shyngle's contention is correct when he says that a man's trial is not concluded until he is sentenced. Only if that be correct can it be said that Suleiman Arab was being jointly tried with the two appellants, and only if he was being tried jointly with the appellants can it be said that he was not a competent witness for the prosecution. We have no doubt that at the time when he gave his evidence he was not on trial. When he pleaded guilty he was convicted on his own plea; there was no issue to be tried. If the case had been tried by a jury Suleiman Arab would not have been put in charge of the jury. He would have been convicted on his plea, and the two appellants would then have been put in charge of the jury to be tried. Suleiman Arab was not being tried jointly with the appellants; and he was therefore a competent witness for the prosecution. There is the vital distinction between the present case and *Kemavor's*.

Umole v I.G.P. Brown, C. J.

The Magistrate convicted—not of stealing as charged—but of attempted stealing. The evidence was that one of the florins was found on the floor of the strong-room, so that only £99-18*s*-0*d* was stolen and not £100 as charged. The Magistrate was apparently under the impression that because they were charged with stealing £100 and were only proved to have stolen £99-18*s*-0*d* he could not convict them of stealing. So he convicted them of attempting to steal £100. In so doing he was clearly under a misapprehension; and, exercising our powers under section 48 (*a*) (*ii*) of the High Court (Northern Region) Law, we alter the finding to guilty of stealing £99-18*s*-0*d* in the case of both appellants.

(The Court then dealt with the question of sentences).

The appeals are dismissed. In the case of both appellants the findings are altered to guilty of stealing. The sentence of the first appellant is increased to one year's imprisonment; and the sentence of the second appellant is maintained.

Appeals dismissed.

Sentence of the first appellant increased.

(*Editor's Note.*—In addition to the decision cited in this case, namely *Commissioner of Police v Kemavor* 7 W.A.C.A. 198, this matter is dealt with in the case of *Rex v Akpan* 6 W.A.C.A. 188, following the English case of *Rex v Smith* 18 Cr. App. R. 19).

ALHAJI MOHAMED LASAKI *v* FARHAM DABIAN

[High Court (Smith J.) September 4, 1956]
[Kano—Suit No. K/44/1956]

Landlord and Tenant—Certificate of Occupancy—Sub-lease—Expiry of written agreement—Defendant exercising option to renew for further three years—Consent of Resident under Land and Native Rights Ordinance—Plaintiff refusing to accept rent—Notice to quit—Increase of Rent (Restriction) (Modification for Native Lands in Northern Provinces) Order-in-Council, 1950—Meaning of 'premises'—s. 3 Increase of Rent (Definition of Premises) (General Application) Consolidation Order, 1942—Recovery of Premises (Withdrawal of Application to certain Areas) Order-in-Council, 1946, as amended—Effect of statutory provisions—Invalidity of notice to quit—Notice of intention to take proceedings.

The Plaintiff held premises known as plot 31 Fagge Ta Kudu under a Certificate of Occupancy. By a written agreement dated the 1st August, 1951, he leased those premises to the defendant for a period of three years, with an option to renew for a further three years. The defendant exercised that option and is still in occupation, although the written agreement expired on the 31st August, 1955. At about this date, the plaintiff applied for and obtained the written consent of the Resident under the Land and Native Rights Ordinance for the defendant to continue as tenant until the 29th February, 1956. On the 1st September, 1955, the defendant tendered a year's rent in advance in purported accordance with the written agreement. The plaintiff refused to accept the rent in advance, and on the same day, served the defendant with written notice to quit the premises on the 29th February. The written agreement contained no express stipulation as to the determination of the tenancy. Upon the issue as to whether or not the Notice to Quit served upon the defendant was a valid notice, it was contended for the Plaintiff that no Notice to Quit was in fact necessary in view of the fact that the tenancy determined upon the expiry of the consent given by the Resident under s. 11 Land and Native Rights Ordinance. The defendant relied upon the provisions of the Increase of Rent (Restriction) Ordinance Cap. 93 and upon the Recovery of Premises Ordinance Cap. 193.

Held:

(1) That the premises concerned were governed by the Increase of Rent (Restriction) Ordinance and the Recovery of Premises Ordinance.

(2) That the Notice to Quit served upon the defendant was short by one day of that period required by the Recovery of Premises Ordinance and was therefore invalid.

(3) That the Plaintiff had failed to serve upon the defendant the Statutory Notice under s. 7 (*ii*) of that Ordinance, the effect of which was to preclude the court from making an order, even though the Notice to Quit had been valid.

CIVIL ACTION

Balogun for the plaintiff.

Shyngle for the defendant.

Smith, J.: The plaintiff is the landlord of premises situate at Plot No. 31 Fagge Ta Kudu (Fagge South) which he holds under a certificate of occupancy. He let to the defendant, as tenant, part of these premises which the defendant used as a shop. The plaintiff has sued the defendant for the recovery of possession of the premises and for mesne profits from 1st September, 1955.

There was a written agreement between the parties dated 1st August, 1951, whereby the plaintiff let the premises to the defendant for twelve months from 1st September, 1951, at an annual rental of £150, with an option of renewal for a further term of three years. The defendant exercised his option and is still in occupation. The written agreement expired on 31st August, 1955. At about this time the plaintiff applied for and obtained the written consent of the Resident under the Land and Native Rights Ordinance for the defendant to continue as tenant until 29th February, 1956. On 1st September, 1955, the defendant tendered a cheque for one year's rent in advance in accordance with clause 2 (*b*) of the written agreement. This the plaintiff refused to accept and on the same day he served on the defendant, as the defendant has admitted in his statement of defence, a written notice to quit the premises on 29th February, 1956. There was no express stipulation in the written agreement for the determination of the tenancy by the plaintiff: and in the absence of such a stipulation the plaintiff decided to give the defendant what purported to be a half-year's notice to quit. It seems to me that the parties intended that as from 31st August, 1955, the tenancy should continue on the terms of the written agreement in so far as they were applicable to a yearly tenancy. The plaintiff did not wish the tenancy to continue longer than was necessary but his notice to quit was given on the basis of a yearly tenancy.

The issue in this case is whether or not a valid notice to quit was served on the defendant. Mr Balogun for the plaintiff contended that the tenancy ceased on 29th February, 1956, because the written

Lasaki v. Dabian — Smith J.

consent to the tenancy required under section 11 of the Land and Native Rights Ordinance expired on that day; and that as the tenancy was for a fixed term no notice to quit was necessary. Mr Shyngle for the defendant relied on the Increase of Rent (Restriction) Ordinance and the Recovery of Premises Ordinance. The issue between the parties is affected by the Land and Native Rights Ordinance, only to the extent of the application of the Increase of Rent (Restriction) (Modification for Native Lands in Northern Provinces) Order in Council, 1950. Section 2 of this Order provides:

> "2. Where any native lands in the Northern Provinces to which the Increase of Rent (Restriction) Ordinance applies, or any building or part of any building situated thereon have been sublet with the consent of the Governor granted under the provisions of section 11 of the Land and Native Rights Ordinance, section 13 of the Increase of Rent (Restriction) Ordinance shall not apply to an action brought by a landlord for the recovery of possession of such premises or for the ejectment of a tenant therefrom after the period for which the Governor's consent to a sub-lease was obtained has expired."

The effect of this Order is to relieve the Court of the duty of having to consider, in regard to premises to which the Order applies, the various conditions set out in section 13 of the Increase of Rent (Restriction) Ordinance which have to be fulfilled before the court can make an order for recovery of possession.

Premises situate at Fagge are subject to the Increase of Rent (Restriction) Ordinance by virtue of section 2 thereof, Fagge being an area included in the Northern Provinces (Increase of Rent) (Restriction) Order, 1942, made under the provisions of regulation 1 of the Nigeria Defence (Increase of Rent) (Restriction) Regulations, 1942, which are referred to in section 2 of the Ordinance. The expression "premises" has the extended meaning (which includes a shop) set out in section 3 of the Increase of Rent Restriction (Definition of Premises) (General Application) Consolidation Order, 1942, made under regulation 3 of the Regulations already referred to, and applies to premises situate at Fagge. This extended meaning has been retained by section 3 (1) of the Ordinance. By section 12 of this Ordinance:

> "No tenant or sub-tenant of any premises to which this Ordinance applies shall be ejected therefrom save in pursuance of an order of the court obtained under the provisions of the Recovery of Premises Ordinance, 1945.";

and this latter Ordinance applies to those areas of the Northern Provinces which are subject to the Increase of Rent (Restriction) Ordinance by virtue of the Recovery of Premises (Withdrawal of Application to

Certain Areas) Order in Council, 1946, as amended by the Recovery of Premises (Withdrawal of Application to Certain Areas) (Amendment) Order in Council, 1951.

The effect of all these Orders is that both the Recovery of Premises Ordinance and the Increase of Rent (Restriction) Ordinance apply to the premises of which the plaintiff is landlord. Thus before the plaintiff can recover possession from the defendant he must first comply with the provisions of the Recovery of Premises Ordinance, section 7 of which provides for statutory Notices to be served on the tenant. These are:

(*i*) a written Notice to Quit as in Form B, C or D, whichever is applicable to the case, and

(*ii*) a written Notice as in Form E of the landlord's intention to proceed to recover possession on a date not less than seven days from the date of service of the Notice.

Section 8 (1) (*d*) of the Ordinance provides:

"(1) Where there is no express stipulation as to the Notice to be given by either party to determine the tenancy the following periods of time shall be given:—

(*d*) in the case of a yearly tenancy, half a year's Notice: Provided that . . . . . ."

The proviso does not apply to the premises in this case. By Section 9 of the Ordinance:—

"Notices referred to in section 8 may be given at any time prior to the date of termination of the current terms of the tenancies, but they shall not be effective if the time between the giving of the Notice and the time when the tenancy is to be determined is less than the respective periods set out in section 8."

The length of a half-year's Notice must be 182 days, the days being reckoned by including the one extreme and excluding the other (Halsbury 2nd Ed. Vol. 20. p. 132). Unfortunately for the plaintiff his Notice to Quit served on the defendant on 1st September and expiring on 29th February was short by one day, as there are only 181 days from the one date to the other. The Notice to Quit was therefore invalid.

I would add that the plaintiff has not served on the defendant a Notice in Form E of his intention as landlord to take proceedings to recover possession. This is a statutory requirement which is an essential prerequisite to the commencement of proceedings in court and the failure to serve such a Notice on the defendant precludes the court from making an order for possession even when a valid Notice to Quit has been served.

There will be judgment for the defendant on the claim for recovery of possession. The claim for mesne profits is not disputed. I enter judgment for plaintiff for £150 on this part of his claim, being mesne profits up to and including 31st August, 1956. There will be no order as to costs, as the judgment is partly in favour of Plaintiff and partly in favour of Defendant.

Judgment for the defendant on the claim for recovery of possession—Judgment for the plaintiff for mesne profits £150.

LAWRENCE ELUMELU *v* INSPECTOR-GENERAL OF POLICE

[C.A. (Bairamian Ag. C.J. and Hurley J.) July 14, 1956
[Jos—Criminal Appeal No. JD/23A/56]

Criminal Procedure—Variation of charge—Altering charge after plea—Substituting new counts for some only of the original counts—Striking out original counts—Criminal Procedure Ordinance, section 163.

Criminal Law—Extortion—Colour of employment—Criminal Code, section 404 (1) (*a*).

The appellant pleaded not guilty to a charge containing six counts of extortion. After two witnesses had been heard, the prosecutor, a Police Sergeant, asked leave to withdraw the last five counts and substitute five counts of stealing. The trial magistrate, without making any order on the application for leave to withdraw, put on the record five counts of stealing drawn up over the signature of the prosecutor. The appellant elected summary trial and pleaded not guilty on each of the five new counts. He was given the opportunity of recalling the witnesses who had been heard in order to cross-examine them further. The five new counts were based on the same facts as the last five counts in the original charge. Having heard the remaining witnesses on both sides the magistrate convicted the appellant on the original first count of extortion and on the five new counts and recorded no finding on any other counts.

It was submitted that the appellant ought not to have been convicted upon the five new counts because he had not first been acquitted upon the five counts which had been withdrawn, and because the five new counts, preferred over the signature of the prosecutor after the withdrawal of five of the original counts, were not an alteration of the charge such as could have been made under section 163 of the Criminal Procedure Ordinance after plea, but amounted to an entirely new charge which could only have been framed under section 162 upon arraignment.

In the opinion of the Court, even if the five counts of extortion were to be regarded as having been withdrawn, that would not have embarrassed the appellant or led to any miscarriage of justice. But it did not appear that they had been withdrawn; the magistrate had proceeded under section 163 by permitting the alteration of the charge by the substitution of five new counts. These did not make an entirely new charge, for they did not entirely replace the original charge, of which the first count remained.

Elumelu
v.
I.G.P.
Hurley J.

Held:

(*i*) The variation of the charge by the substitution of five new counts for five of the six original counts was properly allowed after plea; and

(*ii*) upon the variation of the charge there was no need to withdraw any counts, and the question of acquittal on the counts which had been replaced did not arise. The provisions of the Criminal Procedure Ordinance with regard to the variation of charges are complete in themselves and set out in full what may be done and what is required to effect it, and variation requires no procedural steps not there described and can be effected without the aid of any other provisions of the Ordinance.

The complainant upon the count of extortion on which the appellant was convicted was a labourer working under the appellant. Both were employed by the Federal Government. The count charged a demand of money under colour of the appellant's employment. The evidence was that he asked the complainant to give him 30*s* so that he could upgrade the complainant. There was nothing to show that the appellant suggested, or the complainant supposed, that the appellant's employment entitled him to make the demand.

Held: the demand was not made under colour of the appellant's employment.

Cases cited:

Rex v Ijoma, 12 W.A.C.A. 220.

Commissioner of Police v Motayo, W.A.C.A., Lagos, 11th November, 1950.

CRIMINAL APPEAL

Agbakoba for appellant.

Henderson, Crown Counsel, for respondent.

Hurley, J. (delivering the judgment of the Court): The appellant was convicted by the Magistrate Grade I, Makurdi, on a first count charging extortion under section 404 (1) (*a*) of the Criminal Code by a demand of 30*s* under colour of employment, and on five counts of stealing. The charge upon which the appellant was arraigned consisted of six counts of extortion; these were the first count upon which the appellant was convicted and five counts laid under section 404 (1) (*d*) of the Code. After the appellant had pleaded to this charge the prosecutor, a Sergeant of Police, asked leave to withdraw the last five counts and substitute counts of stealing. The appellant had no objection to this, and five counts of stealing signed at the end by the prosecutor were put into the record and read over to the accused, who elected summary trial and pleaded not guilty on each of the five

counts. Mr Agbakoba for the appellant referred us to *Rex v Ijoma*, 12 W.A.C.A. 220 (Lagos, 31st October, 1947), where it was held that before an accused person has pleaded to a charge the court may permit or direct an entirely new charge to be framed under section 162 of the Criminal Procedure Ordinance, but after he had pleaded it is only open to the court to permit or direct, under section 163, such alterations of or additions to the original charge as may be permissible having regard to the rules for the joinder of offences in one charge, and an entirely new charge may not be framed after plea. Section 78 (*b*) of the Criminal Procedure Ordinance says that proceedings may be instituted in a magistrate's court by bringing an arrested person before the court on a charge contained in a charge sheet signed by the Police officer in charge of the case. Mr Agbakoba submits that since the prosecutor asked leave to withdraw five counts, and then put in five new counts over his signature, the five new counts were an entirely new charge which ought not to have been allowed in at that stage, and the appellant was not properly tried and convicted on them. The five counts of stealing in our opinion were not an entirely new charge, for they did not entirely replace the original charge, of which the first count remained; they were an alteration of the original charge and the alteration was properly made under section 163.

It may be well to observe that the five counts of stealing were based on exactly the same facts as the original five counts of extortion under section 404 (1) (*d*) of the Code; no new facts were to be proved, but the construction which the court was being asked to put upon the facts was being varied. Section 161 of the Criminal Procedure Ordinance allows the joinder of charges of different offences where it is doubtful which of several offences the facts which can be proved will constitute, and it was unnecessary for the prosecutor to ask leave to withdraw the five counts of extortion before the counts of stealing were put in.

These submissions of Mr Agbakoba's on which we have just given our opinion were made under the first of the appellant's additional grounds of appeal; they have no apparent relevance to that ground, and there is no ground to which they are relevant, and in giving our opinion on the submissions we have disregarded the defect. The first additional ground of appeal was left unsupported by argument, but it must be noticed. It is that the five counts of stealing were badly laid because the magistrate ought not to have entertained them without first acquitting the appellant on the original five counts which were withdrawn. However, it does not seem that the original counts were withdrawn; the prosecutor asked leave to withdraw them, but the magistrate did not give it. He accepted the new counts and the accused pleaded to them, and the original counts were not mentioned again and the magistrate made no findings in regard to them. After

Flumelu v. I.G.P. Hurley J.

he had pleaded to the new counts, the magistrate asked the appellant did he wish for the recall of any of the prosecution witnesses who had already been heard, which is what the court is required by section 165 of the Criminal Procedure Ordinance to ask an accused person after a charge has been altered under section 163. The proceeding was under section 163; the charge was altered by the substitution of five new counts for five of the six original counts. There was no need to withdraw any counts, and the question of acquittal or discharge on the original counts did not arise. The provisions of the Ordinance with regard to the variation of charges are complete in themselves and set out in full what may be done and what is required to effect it, and variation requires no procedural steps not described in the sections which deal with it, and can be effected without the aid of any provisions of the Ordinance outside those sections. If, however, the original counts 2 to 6 may be regarded as withdrawn, that did not embarrass the appellant or lead to any miscarriage of justice.

Upon the conviction on the first count, extortion contrary to section 404 (1) (*a*) of the Criminal Code, it has been submitted that the decision was wrong in law in that the money was not obtained under colour of the appellant's employment. The appellant was a leveller employed by the Federal Survey. He had labourers working under him in a gang of which he was in charge. He had no power to re-grade any of the labourers, but he could make recommendations to his superior officer. He asked one of his labourers, Mohammedu Kano, who was the second prosecution witness and the complainant in the first count, to give him 30*s* so that he, the appellant, could make him up to a higher grade in his job. Before the magistrate, defending Counsel cited *Commissioner of Police v Motayo*, decided by the West African Court of Appeal sitting at Lagos on 11th November, 1950. In this judgment the magistrate said "Counsel rightly submits that there must be a deceit by accused based on the fact of his employment. There is none here, he says, so accused must be acquitted. I respectfully disagree. The deceit was 'I am your superior, and in a position to influence your promotion' . . . . . I find that the accused did demand money, offering to bring about (or considerably improve the chances of) promotion of P W 2."

In *Commissioner of Police v Motayo* the Court said of section 404 (1) (*a*) "To constitute an offence under that section there must, in our view, not only be a corrupt demand, but also a pretence that the party making it is lawfully empowered to do so by reason of his employment. It is immaterial whether he pretends that the money is to be paid into the funds of the public authority that employs him or whether it is a perquisite for himself; it suffices if he conveys the impression to his victim, whether directly or by implication, that by virtue of his employment he is entitled to demand it." The important

point to observe for the purposes of this case is that a demand is made under colour of employment not simply by being made with reference to the employment, or by being based on the fact of the employment, as the magistrate put it; it must be so made as to convey the impression that the employment entitles the accused to make it. The demand of 30*s* to up-grade Mohammedu Kano made by the appellant in this case was no doubt made because his employment had put him in a position to make it, but there is nothing to show that the appellant ever suggested or implied, or Mohammedu Kano ever supposed, that his employment entitled him to make it. The demand was not made under colour of the appellant's employment and the appeal on the first count succeeds.

The appellant gave their pay for the month in question to the labourers in his gang, and the prosecution case on the five counts of stealing was that he held back part of the pay of five of them. It has been argued that the evidence did not go to prove the charges of stealing because it showed that the various amounts due were the property of the Federal Government and not of the individual labourers as was alleged in the several counts. We express no opinion as to whether the money was correctly described as being the property of the labourers; it is sufficient to say that the error, if any, in the particulars of these five counts could not have misled the appellant—indeed, he would probably have found it difficult to understand the charges, and more difficult to distinguish them, if the money had been described as the property of Government. Since the error, if any, could not have misled the appellant, it would not have been material (section 166 of the Criminal Procedure Ordinance), and it would not be a ground for interfering with the magistrate's decision; it did not lead to any substantial miscarriage of justice (section 47 of the High Court Law, proviso).

It is submitted that there was no evidence to support the convictions on the 5th and 6th counts, respectively charging the theft of 2*s* 6*d* from Abdul Ali, the 4th prosecution witness, and 3*s* from Isaru Katsina, the 6th prosecution witness. Abdul Ali says he received his pay in full and appellant then asked him for 2*s* 6*d*, which he gave to the appellant, he does not explain why The witness did not know why the appellant asked for the money and he did not report the occurrence to anybody. The evidence of Abdul Ali by itself does not suffice to show that the appellant stole 2*s* 6*d* from him. The evidence of two other witnesses, Lawrence Banigo and William Aban, went to show that the appellant made deductions from the pay of all the complainants except Isaru Katsina, upon whose case it shed no light, but it did not conflict with Abdul Ali's evidence that in his own case he gave the appellant the money after he had been paid in full. That being so, Abdul Ali's evidence on the point must be accepted. But he did not explain why he gave the money to the appellant, or suggest that he gave it unwill-

Elumelu v. I.G.P. Hurley J.

ingly. There is other evidence to suggest that he may have given it unwillingly, but we think the suggestion is not enough, and there should have been evidence about his reasons from Abdul Ali himself.

Isaru Katsina first said that he received his pay correctly; then he said that he did not know what he was entitled to; finally, in reply to the magistrate, he said that he should have received 4*s* more and that the appellant told him he had 4*s* to come. That was in respect of overtime; but the witness said he was not paid any more overtime. In fact, 4*s* more was due to him; his pay had been miscalculated and was shown in the Paybook as £8 1*s* 0*d* when it should have been £8 5*s* 0*d*. Appellant in his evidence said that he had shortpaid Isaru Katsina by 4*s*, being short of money because of the error of the voucher (it was in fact in the Paybook). The appellant's superior officer, who had given him the money to pay the labourers, said he himself put the mistake right at the end of the following month. He did not say he did this by giving the 4*s* along with that month's pay for the labourers to the appellant for the appellant to give it to Isaru Katsina; indeed, he said that normally he paid the labourers himself, from which it seems more likely than not that he put the mistake right in person and that the 4*s* never came to the hand of the appellant. If Isaru Katsina did not get the 4*s* in the end (and his evidence is not as clear about that as could be wished) it was not shown that that was because the appellant kept it, for there was no sufficient evidence to show that he ever had it. The appeal is allowed on the 5th and 6th counts.

Appeal allowed on the 1st, 5th and 6th counts; conviction and sentences on those counts are set aside. Appeal dismissed on the 2nd, 3rd and 4th counts, and convictions and sentences affirmed.

Appeal allowed in part and in part dismissed.

OSITA OKEKE *v* INSPECTOR-GENERAL OF POLICE

[C. A. (Bairamian Ag. C. J., and Hurley J.) July 11, 1956]
[Jos—Criminal Appeal No. 32A/56]

Road Traffic—Regulations No. 43 *of* 1947—*Regulation* 39 (3)—*obstruction of public highway by motor vehicle—Suspension of driving licence—Road Traffic Ordinance, s.*8.

The appellant was convicted under Regulation 39 (3) of obstructing the public highway (1) with stones and other impediments, and (2) with his motor vehicle, which he left standing in the road. He was fined, and his driving licence was suspended.

Held:

Regulation 39 (3) is confined to obstruction by a motor vehicle.

Held also:

Section 8 of the Road Traffic Ordinance confines suspension of licence to offences in connection with the *driving* of motor vehicles.

CRIMINAL APPEAL

Eso for the appellant.

Henderson, Crown Counsel, for the respondent.

Bairamian, Ag. C. J. (delivering the judgment of the Court): The appellant was sentenced on two counts, both laid under regulation 39 (3) of the Road Traffic Regulations No. 43 of 1947, which reads—

> "Any person who causes or permits any motor vehicle to obstruct a public highway shall be guilty of an offence."

The first count alleged that he put stones and some other impediment which obstructed the road. Learned Crown Counsel conceded that that was not an offence under regulation 39 (3), and that is so, for the regulation speaks of obstruction by a motor vehicle.

As regards the second count, it did allege that the appellant obstructed the highway with his vehicle, but the learned Magistrate, besides fining the appellant, also suspended his licence for three months.

In regard to the suspension of the licence the Court drew attention to section 8 of the Road Traffic Ordinance, which reads—

> "Any court before which a person is convicted of any offence in connection with the driving of a motor vehicle:—

Okeke v. I.G.P.

Bairamian C. J.

(*a*) may, in addition to any other penalty imposed, if the person convicted holds a driver's licence, suspend his licence for a specified period, etc."

The offence must be in connection with the driving of a motor vehicle; obstructing the highway by leaving the vehicle standing in the middle of the road is not an offence in connection with driving. This view is fortified by a note to that effect in Stone's Justices' Manual (1956) at page 2056, with reference to the analogous section 6 of the Road Traffic Act, 1930. The suspension of the licence was therefore an illegal order.

When one looks at regulation 103, re-numbered 102, one finds that breach of regulation 39 (3) is punishable with fine for a first offence, and for a second or subsequent offence with fine or imprisonment or both. There was a fine in this case, and that was lawful; nor was it excessive in the circumstances.

Order: The appeal is allowed on count 1, and the conviction and fine thereon are set aside; as regards count 2 the order suspending the licence is set aside but the fine of £10 is confirmed.

Appeal allowed on count 1; *suspension of licence under count* 2 *set aside.*

EGBADEKWU ONOBU *v* INSPECTOR-GENERAL OF POLICE

[C.A. (Bairamian Ag. C.J. and Hurley J.) 14 July, 1956]
[Jos—Criminal Appeal No. JD/45A/56]

Criminal Law—Obstructing Police Officer in the execution of his duty—Advising arrested person not to make statement to Police Officer—Judges' Rules—Criminal Code, section 356 (2).

A suspected person was arrested and taken to a Police Charge Office and was there charged and cautioned by a Police Officer. The appellant, who was present, advised him not to make a statement. The suspect said that he reserved his statement. There was no evidence that he had ever intended to make one. The appellant was convicted of obstructing the Police Officer in the execution of his duty.

Held: Allowing the appeal, that to advise an arrested person not to say anything in answer to the charge put to him by a Police Officer does not constitute the offence of obstructing the officer in the execution of his duty.

CRIMINAL APPEAL

Kayode Eso for appellant.

Henderson, Crown Counsel, for respondent, did not support the conviction.

Hurley, J. (delivering the judgment of the Court): The appellant was convicted by the Magistrate Grade I, Makurdi, sitting at Oturkpo, upon the following charge (which was the second charge or count on charge sheet):—

> "That you Egbadekwu Onobu on the 6th day of January, 1956, at Oturkpo in the Benue Province in the Jos Magisterial District, did wilfully obstruct Gabriel Aba, a Police Officer in the Idoma Native Authority Police Force, while he was acting in the execution of his duty (to wit taking of statement of an accused person) and thereby committed an offence contrary to section 356 (2) of the Criminal Code."

In his judgment, the Magistrate said—

> "On the second count, I find as a fact that accused did advise Victor Ameh, then an accused person whose case was under investigation, not to make a statement to the Police. I have to

Onobu
v.
I.G.P.
Hurley J.

decide whether that constitutes the offence of wilful obstruction. The only authority which I can find in my diminutive touring library is 33 Archbold at page 1041, saying that the offence of obstruction does not necessarily imply assault, and extends to acts done to interfere with Constables who in the execution of their duty under statute on lawful orders are seeking to obtain evidence as to offences. Now the statement of an accused person taken just after his arrest is often very important evidence as to the offence with which he is charged. It may be in his favour. That of course in no way detracts from its importance. The accused has a perfect right to withhold his statement. His legal adviser has a perfect right to advise him to do so, and nobody could accuse him of obstruction. I doubt whether an outsider with no professional relationship to the accused person has that right. Certainly it is grossly improper for a Constable to give such advice contrary to the requirements of his N.C.Os. It is abundantly clear that accused sided with Victor Ameh against the remainder of the Police. I believe that accused acted knowingly against the interests of justice, and is therefore guilty on the second count."

The cases cited in Archbold's 33rd Edition in support of the proposition quoted, it may be observed, are cases where the defendants warned motorists about Police speed-traps.

When a person is under arrest on a criminal charge, it is not the duty of the Police to obtain evidence in the form of a statement from him. It is their duty to record what he says after he has been charged and cautioned, if he says anything; but it is not their duty to get him to say anything. They are to take his statement, that is, to record it; but they are not to obtain it, that is, to get it out of him. They have no duty to obtain anything from him, because he is not obliged to say anything. To inform him of that, when he has been arrested and charged, he is addressed in the words of the caution prescribed by the Judges' Rules, words well known to the Police and in the courts; he is told that he is not obliged to say anything unless he wishes to do so. The charge and the caution are not put to the arrested person in order to elicit from him something that may be evidence in the case, whether against him or for him, but to give him an opportunity to say for himself whatever he may have to say while at the same time leaving it open to him not to say anything. The Judges' Rules were framed for the guidance of the Police, and this Court will not say that it is the duty of a Police Officer to act in disregard of the Rules, or that it is his duty to obtain a statement from an arrested person when the Rules are so plainly designed to leave it open to arrested persons to say nothing, and to prevent Police Officers from trying to get them to say anything.

Onobu
v.
I.G.P.
Hurley J.

Since Victor Ameh, the arrested person in the present case, was not obliged to say anything in answer to the charge, and the Police Officer who had charged and cautioned him and was ready to take his statement had no duty to obtain it, the appellant, in advising Victor Ameh to say nothing, did not prevent the officer from getting anything he had a duty to obtain, and did not obstruct him in the execution of his duty of obtaining evidence in the case. The duty of the officer, at the most, was to record whatever Victor Ameh might say, if anything; but there was no evidence before the magistrate that he wished to say anything, and so there was no evidence that the officer was obstructed in the execution of that duty either.

As the magistrate observed in his judgment, an arrested person's legal adviser has the right to advise him not to say anything in answer to the charge. That is well known, and legal advisers frequently give such advice and it is never suggested that in giving it they are obstructing the Police and committing an offence under section 356 (2) of the Criminal Code. If when a legal adviser gives the advice which the appellant gave he is not committing that offence, it is either because giving the advice is not an obtruction of the Police in the execution of their duty, or because it is an obstruction (as the magistrate held) but legal advisers are exempt from liability therefore by virtue of some exception to the provisions of section 356 (2). There is no such exception in the section itself, or elsewhere in the Criminal Code, and it does not appear that the exception exists. It follows that advising an arrested person not to say anything in answer to the charge against him is not an obstruction of the Police in the execution of their duty within the meaning of section 356 (2) of the Criminal Code.

For these reasons, this appeal was allowed and the conviction and sentence were set aside.

Appeal allowed

VICTOR AMEH *v* INSPECTOR GENERAL OF POLICE

C. A. (Bairamian Ag. C. J., and Hurley J.) July 14, 1956

[Jos—Criminal Appeal No. 53A/1956.]

Criminal Law—Criminal Code, s. 99: extortion by public officers—"Corruptly" in charge—Treasurer receiving money to pay on false certificate.

Appeals from Magistrates (Criminal)—Need for record of amended charge.

The allegation was that the appellant, as treasurer, received money in order to pay out an amount. The first charge was a charge of official corruption under s. 98 of the Code; this was amended to a charge of extortion for the performance of one's duty under s. 99. But the word "corruptly" was left in. The document presented to the appellant certified that the job had been done—which he knew was not true.

The record of appeal did not set out the amended charge.

Held: *Prima facie* it could not have been the appellant's duty to pay on what he knew was a false certificate, and there was no evidence that it was.

Quaere whether a charge under s. 99 of the Code is a possible charge if it includes the word "corruptly".

Per curiam: When a charge is amended the record should be amended to show the amended charge to which the defendant is asked to plead.

Case cited:

Biobaku v Police, 20 N.L.R., 30.

CRIMINAL APPEAL.

Eso for the appellant

Henderson, Crown Counsel, for the respondent.

Bairamian, Ag. C.J. (delivering the judgment of the Court): The appellant was convicted on a count laid under section 99 of the Criminal Code. At first he was charged under 98(1) of the Code in these terms:

"That you Victor Ameh on the 7th day of January, 1956, at Oturkpo in the Benue Province in the Jos Magisterial district being a person employed in the public service of Nigeria and being

charged with the duty (sic) performance of the duty of a treasurer did corruptly receive the sum of two pounds from John Oyim *in order that you might check pass and pay the sum of fifteen pounds due to him* and thereby committed an offence contrary to section 98(1) of the Criminal Code."

On a subsequent day the prosecution applied to amend the second count to come under s. 99 and not under s. 98(1) and the charge was amended accordingly. It is a pity that the Magistrate's directions for the amendment of the record of the charge to which the appellant was asked to plead afresh were not followed. The record should always be amended. We had to wire for information, and the answer was that these words were struck out, namely:

in order that you might check pass and pay the sum of fifteen pounds due to him:

and the following words were substituted for them:

for the performance of your duty being a reward beyond your proper pay and emoluments.

Section 99 of the Code reads as follows:

"Any person who, being employed in the public service, takes, or accepts from any person, for the performance of his duty as such officer, any reward beyond his proper pay and emoluments, or any promise of such reward, is guilty of a felony, and is liable to imprisonment for three years."

The word "corruptly" does not appear in section 99, and it was a mistake to leave it in when amending the charge from being a charge under section 98(1) which requires the word "corruptly", to a charge under section 99. It is odd to charge a person with *corruptly* taking a reward *for the performance of his duty*; the whole point about the word "corruptly" in section 98 is that the officer takes money in order to act in a manner contrary to his duty or to show favour in the discharge of his function. This point will not be enlarged upon here as there is a reported decision, namely *Biobaku v Police*, 20 N.L.R., 30, where the sections are explained. It is dubious whether the charge as amended is a possible charge at all under section 99: it is self-contradictory; but there is another point.

The story about the £2 arose in this way: someone, (P.W.3), came to the appellant with a yellow piece of paper from the Inspector of Works, exh.E, which is a Jobbing Order and which bears this certificate:

"I certify that the Jobbing Order as amended has been completed and that the value for payment is £15."

Ameh v. I.G.P.

Bairmian Ag. C. J.

The finding of the Magistrate is that—

> "Accused knew that P.W.3 wanted the money in order to charter the lorry from R. D. Oche, a lorry owner, so in my opinion the question of the legality of payment to P.W.3 does not arise."

The question which does arise is whether it was the duty of the appellant as treasurer to give £15 to John Oyim (P.W.3) for that purpose on a false certificate—for it was false to his knowledge—that the job had been done and the £15 earned and due for payment. *Prima facie* it could not have been his duty; and there is no evidence that it was; consequently the conviction for an offence under section 99 was wrong and must be set aside.

The appeal is allowed and the conviction and sentence are set aside.

Appeal allowed.

MAI RAI *v* BAUCHI N.A.

[C.A. (Sir Algernon Brown C.J. and Bairamian S.P.J.) August 23, 1956]
[Jos—Criminal Appeal No. JD/69A/56]

Appeal from Native Court—Constitution of Court altered during the course of the case—Mohammedan Law.

The appellant was convicted of homicide in the Court of the Emir of Bauchi. On the first day of the trial seven members of the Court were present. On the following day four members only were present. The case was then adjourned part heard for some three weeks; and at the adjourned hearing four members only were present, and the appellant was convicted and sentenced to death.

Held:

(1) There was no proper trial because all the members of the Court which gave the judgment did not hear all the evidence;

(2) There is no substantial difference on this principle between Maliki Law and English Law.

Cases referred to:

Katsina N.A. v Mallam Betti Ronka (W.A.C.A. Selected Judgments July, October-December 1950, page 18).

Egba N.A. v A. L. Adeyanju (13 N.L.R. 77) applied.

CRIMINAL APPEAL

Anionwu for the appellant.

Bello, Crown Counsel, for the respondent.

Brown, C.J. (delivering the judgment of the Court): Mr Anionwu on behalf of the appellant did not seek to argue this appeal upon its merits. But he very properly took a point, which he frankly described as a technical point. Though technical in the sense that it has no bearing upon the merits, it concerns a most important principle; and in considering it we have derived benefit from the arguments of learned Counsel on both sides.

This case first came before the Emir of Bauchi's Court on the 18th of May. Seven members were then present. It then adjourned, with the case part heard, until the following day, when only four members were present. On that day, having heard one more witness, it adjourned until the 9th of June. On that day it appears from the English translation that five members were present including the

Mai Rai v. Bauchi N.A. Brown C. J.

Wali, but in the Hausa copy of the record it appears that only four were present, the Wali being absent. Judgment was delivered on that day; the appellant was convicted and sentenced to death.

Mr Anionwu referred us to the W.A.C.A. decision of *Katsina N.A. versus Mallam Betti Ronka* (selected judgments July, October-December 1950, page 18) in which the appellant had been convicted of homicide and sentenced to death. The Emir of Katsina had been absent on the first two days of the trial, but had presided at the further hearings. In holding that it was "essential that all the members of the Court which gives the judgment in a criminal case should have heard all the evidence", the Court reviewed various decisions given in civil cases where the same principle had been held to apply, and one decision given on appeal from a Native Court in a Criminal Case. This was the case of *Egba N.A. versus A. L. Adeyanju* (XIII N.L.R. 77) in which Graham Paul, J., held that—

> "Even if such procedure was in accordance with native law and custom it was not such native law and custom that the Court should uphold as it was repugnant to natural justice, good conscience and equity".

And in the Katsina case the W.A.C.A. adopted the decision of Graham Paul, J.

We are advised by our Assessors that there is no substantial difference between the principle contained in Maliki law and the principle contained in that decision. Only if a member of the Court dies or is seriously ill ("so ill that he cannot speak" was how one Assessor expressed it) may the other members of the Court proceed with the case in his absence. Subject to that, the rule in Maliki law is that all the members who started the case must hear and determine the whole of it.

In the present case there was no proper trial—because the members of the Court did not all hear and determine the whole of it—and the trial was a nullity. We therefore order that the decision of the Court below be set aside and that the appellant be remanded in custody and retried before a Court of competent jurisdiction; (section 67 (1) (*b*) (*ii*) of the Native Courts Law). In all the circumstances of this case we see no reason why the Court of the Emir of Bauchi should not retry the case; and we order accordingly.

Retrial ordered.

KAWULE DAN TUKUR INDABO *v* KANO NATIVE AUTHORITY

[C. A. (Sir Algernon Brown C.J., Smith J.) October 23, 1956]

[Assessors: Alhaji Muhammadu Bello, Wali of Katsina;
Mallam Ahmadu Dan Masani, Muftin Majalisa of Katsina]

[Kano—Criminal Appeal No. K/10A/1956]

Moslem Law—Homicide—Proof of intentional homicide ('amd)—Dying declaration giving rise to grave presumption (lauth)—Necessity for Kasama Oath—Intent not apparent from dying declaration nor from contents of oath—issue of intent not raised in court below.

On the 23rd February, 1956, the appellant was convicted of intentional homicide in the Court of the Emir of Kano and sentenced to death. The facts alleged at the trial were as follows. During the early hours of 30th November, 1955, the appellant broke into a hut at Zango Village. The occupier of the hut, one Zubairu, awoke and chased the appellant. After running for some distance, the appellant discovered that Zubairu alone was pursuing him. He stopped and turned round, drawing his knife at the same time. He warned Zubairu that if he came any closer his life would be in danger. Zubairu struck out at the appellant hitting him on the forehead with a stick. The appellant then slashed Zubairu in the stomach, bringing out his intestines, and stabbed him on the thigh and on the knee. He then escaped leaving Zubairu on the ground.

The Village Head was sent for and both before and after his arrival Zubairu maintained that it was 'Kawule of Indabo, the thief' who had stabbed him, and stated that if he died the appellant alone was to blame. He further enumerated the places in which he had been stabbed, which statement so far as the wounds were concerned was supported by the evidence of the witnesses to the washing of the deceased's body. He did not however state in terms that the stabbing was intentional. Zubairu died the same day.

The appellant alleged at the trial that he was somewhere else upon the day in question and put forward certain facts to support this alibi. He was not asked whether he wished to call any witnesses and did not in fact call any. The blood guardians, who were the guardians of the small children of the deceased, asked for retaliation and took the Kasama Oath. The oath contained no mention of the question of intent. The appellant was sentenced to death. The appellant appealed to the High Court, and on the 18th April, 1956,

Indabo v. Kano N.A. Brown C. J.

that Court (Bairamian Ag. C.J., Smith J.) sent the case back for retrial before the Emir of Kano, with a direction that the appellant should be asked whether he had any witnesses to his alibi, and if he had, that they should be heard. The appellant named a number of witnesses, and the Emir of Kano sent for them and heard their evidence, which however did not assist the appellant. On the 11th September, 1956, the appellant was again sentenced to death. The Kasama Oath was not taken at the retrial. From that decision, the appellant once more appealed to the High Court, two of the grounds being (*a*) that the Kasama Oath was not taken at the retrial, (*b*) that at the first trial the Kasama Oath had not dealt with the question of intent.

Held:

(1) That the case was proved according to Maliki Law by the dying declaration of the deceased supported by the Kasama Oath taken by the blood guardians.

(2) That the Kasama Oath cannot be taken more than once upon the same matter.

(3) That in Maliki Law, where the nearest agnates are women or children, the Kasama Oath may be taken either by the guardians of the children or by more remote adult male agnates.

(4) That as the issue of intent was never raised in this case, it was not essential that the words 'with intent' should appear in the Kasama Oaths.

Per-curiam Had the court been satisfied that it was an absolute requirement that the words 'with intent' should appear in the record of the Kasama Oath, they would have sent the case back in order that the Oath might be made to deal with this question.

Cases referred to:

Rabo Maroki v Kano Native Authority 1956 N R.L.R. 5 applied.

CRIMINAL APPEAL

J. Jones for the appellant.

Intentional homicide in Maliki law can be proved by the evidence of two witnesses to a dying declaration followed by the Kasama Oath. There was no Kasama Oath taken in this case.

[Smith J.: The Kasama Oath was taken in the first trial, and appears in the record of that trial.]

Not in possession of the record of the first trial, but if that is so will withdraw the point. Secondly the Kasama Oath was not properly taken. Ruxton's *Maliki Law* 1862. In this case those persons

taking the oath did not swear that the wounds were inflicted with intent.

[*Wali of Katsina:* The Kasama Oath must be taken upon two things. The blood relatives must swear fifty times either (1) that the accused struck or stabbed our relative by mistake and that the blow killed him. This will give rise to compensation (diyah), or (2) that the accused struck or stabbed our relative with intent and that the blow killed him. This may give rise to retaliation.]

Here the question of intent was not contained in the oath. The Oath was bad. Thirdly, the Kasama Oath was taken by the guardians of the children and not by the nearest agnate relatives. The authorities quoted in the Court below (viz. Dusuki IV pp. 258-9; Hirshi V 265; Khattab VI 252) give the power to the guardian to make the choice of pardon, compensation or retaliation on behalf of the children of the deceased, but not the power to take the Kasama Oath. Lastly, the facts outlined in the introduction of the case to the Emir's Court could not be supported by the evidence called.

McLean, Crown Counsel, for the respondent.

Best idea of Moslem Judicial procedure to be obtained from footnote to Ruxton's *Maliki Law* p. 288. Self acting system. Procedure automatic. More importance laid on form than substance.

[*Chief Justice:* What one calls 'judgment by rule' rather than 'judment by reason'!]

Form is essential. Intentional homicide to be proved by confession, two eye witnesses or Kasama Oath. Nature of grave presumptions requiring Kasama Oath contained in Anderson's *Maliki Law of Homicide* at p. 6. This is a case of a dying declaration giving rise to grave presumption followed by the Kasama Oath. The case is properly proved according to Maliki Law. The Kasama Oath was taken at the first trial and cannot be taken again. It was taken properly, although the question of intent was omitted from record of the oath. Not an essential requirement. Anderson p. 7 'the dying man may add that the homicide was deliberate or accidental, or in default, his heirs may specify which it was'. The word 'may' is the operative word. It is not mandatory. Fact that it is omitted not fatal to conviction. Intent can equally be gathered from surrounding circumstances such as the nature of the wounds. *Jalo Tsamiya v Bauchi Native Authority* (unreported).

[*Chief Justice:* The question of intent was never raised in the court below. The defence was that the appellant was never there.]

The Kasama Oath was taken by the proper persons. In this case the guardians of the children are also the nearest agnates and were

Indabo v. Kano N. A. Brown C. J.

the persons to take the oath. If the court is of the opinion that the oath is defective in any respect the proper course is to send it back to the court of the Emir of Kano, to be properly taken. (*Katsina Native Authority v Abdullahi Kogo* XIV) N.L.R. 49.

Brown C. J. (delivering the judgement of the Court):

The defence in this case was an alibi, and when this appeal first came before this Court last April it was sent back to the Court of the Emir of Kano in order that certain witnesses to the alibi might be called.

In Maliki law this case was proved by the dying declaration and the Kasama oaths. The Kasama oaths were only taken at the first trial, but we are advised they could not be taken at the second trial because they cannot be taken twice on the same matter. So where a retrial is ordered, the record of the second trial will not contain the Kasama oaths if the oaths have been sworn at the first trial. Counsel for the appellant has taken two other points about the oaths in this case. The first was that the guardians of agnates who are minors cannot take the Kasama oaths. We are advised that that i not so, and that where the nearest agnates are women or children either their guardian can take them or more remote agnates may take them, provided they are male adults. And the second point taken by appellant's counsel was that the oaths do not deal with a necessary ingredient that the killing was done with intent and was not accidental. If we thought that it was an absolute requirement that the words "with intent" should appear on the record of the Kasama oaths, we should send this case back in order that the oaths might be made to deal with the question of intent. We do not consider that is necessary. Intent was never in issue in this case. It was never disputed that Zubairu, whoever killed him, was killed intentionally.

So in Maliki law this homicide is proved by the dying declaration and the Kasama oaths. Following our observations in *Rabo Maroki v Kano Native Authority*, (1956) N.R.L R. 5, and the questions that are set out on p. 6, it only remains to ask ourselves if there is any likelihood of a miscarriage of justice having occurred. Apart from the dying declaration, there is the evidence of the wound on the appellant's nose which to some extent supported that part of the dying declaration which said that the deceased struck Kawule on the face and leg. There is the appellant's attempted explanation of how he came by the wound on the nose when he said he was beaten by Maisango with a bow. This was denied by Maisango. There was the evidence of Maisango that on being arrested the appellant denied that his name was Kawule and said that his name was Sale; and then when they

looked at his tax receipt they found that his name was Kawule. The appellant's alibi was that he was at Gujungu living in the house of one Haba Fatoma. He called some three witnesses in order to establish his alibi—which was the reason why this case was sent back for a rehearing. None of them supported his alibi and one of them, Nababa, said that there was no such person as Haba Fatoma living in the area of Gujungu.

Finally we should like to say that on this rehearing the trial appears to have been most fully conducted and it is a pleasure to read so clear a record. The appeal is dismissed.

Appeal dismissed.

CHARLES ADDO QUARTEY *v* INSPECTOR-GENERAL OF POLICE

[C. A. (Sir Algernon Brown C.J. and Smith J.) September 22, 1956]

[Kano—Criminal Appeal No. K/32A/1956]

Powers of a magistrate of the first grade—distinction between section 20(*a*) *of the Magistrates' Courts* (*Northern Region*) *Law*, 1955 *and section* 20 *of the Magistrates' Courts Ordinance* (*now repealed*)*—limitation in section* 20(*a*) *of the Magistrates' Courts* (*Northern Region*) *Law*, 1955, *extends to any cause or matter.*

The facts which are material to this report appear in the first paragraph of the judgment.

Held:

The limitation on the powers of a magistrate of the first grade which is contained in section 20(*a*) of the Magistrates' Courts (Northern Region) Law, 1955, extends to *any cause or matter*; therefore the maximum period of imprisonment which he may impose in the aggregate in respect of any number of offences in any one case must not exceed two years.

Cases referred to:

Fashola v Police, XX N.L.R. 126 followed;

Emone v Inspector-General of Police, 1956, N.R.L.R. 55 applied.

CRIMINAL APPEAL

Appellant in person.

McLean, Crown Counsel, for the respondent.

Smith, J. (delivering the judgment of the Court): The appellant was convicted by the magistrate Grade I Kano of the offences of making counterfeit coins, of being in possession of a counterfeiting mould and of being in possession of potassium cyanide. He was sentenced to terms of imprisonment which in the aggregate amounted to four years. [The learned Judge then dealt with the facts of the case.] There is no merit in the appeal against conviction, and the only reason for putting this appeal before two judges was to consider the question of sentence.

We drew the attention of Mr McLean (for the respondent) to the aggregate sentence imposed which appeared to be in excess of the powers of a magistrate of the first grade. Mr McLean conceded that by section 21(*a*) of the Magistrates' Courts Ordinance (now repealed)

Quartey
v.
I.G.P.
Smith J.

the power to imprison vested in a magistrate of the second grade was limited to one year in any one cause or case—*Fashola v Police* 20 N.L.R. p. 126. The wording of section 20(*a*) of the Magistrates' Courts (Northern Region) Law, 1955, is the same as that of section 21(*a*) of the repealed Ordinance except that the former section refers to a magistrate of the first grade. When this was drawn to Mr McLean's attention, he also conceded that the power of a magistrate of the first grade to impose imprisonment is limited to a maximum of two years in any one case.

Section 380 of the Criminal Procedure Ordinance provides that "where two or more sentences passed by a magistrate's court are ordered to run consecutively the aggregate term of imprisonment shall not exceed four years or the limit of the jurisdiction of the adjudicating magistrate whichever is the greater". This section provides for consecutive sentences and was in harmony with section 20 of the Magistrates' Courts Ordinance because as this court said in *Emone,s* case (1956 N.R.L.R. p. 55) that section "spoke of the *offences* a magistrate of the first grade could try and of the imprisonment he could impose in respect of those offences; there was no limitation in the section in regard to *a cause*." Full effect could be given to both sections because section 20 limited the term of imprisonment for any one offence to two years and if in any one cause a person was convicted of more than one offence a magistrate of the first grade could be virtue of section 380 of the Criminal Procedure Ordinance impose consecutive sentences aggregating not more than four years. But section 20(*a*) of our Magistrates' Courts Law limits the powers of a magistrate of the first grade to a maximum fine of £200 or a term of two years' imprisonment or both "and such limitation shall extend to any cause or matter". In other words a magistrate of the first grade may not impose a sentence of more than two years imprisonment in any one case. The result is, reading section 380 of the Criminal Procedure Ordinance side by side with section 20(*a*) of our Magistrates' Courts Law, that the effect of the former section is limited by the latter and the aggregate sentence that a magistrate of the first grade may now impose in any one case is limited to two years.

The magistrate Grade I Kano exceeded his powers in imposing an aggregate sentence of four years and this must be reduced to two years. The simplest way of dealing with this matter is to order that the sentences imposed shall be concurrent.

Conviction upheld.
Sentence reduced.

GONI KINNAMI *v* BORNU N.A.

[C. A. (Bairamian S.P.J., and Reed Ag. J.) Assessors: Wali Adam, Mallam Talba Abba: September 20, 1956]

[Jos—Appeal No. JD/68A/1956]

Moslem law—Presumption of innocence—Duty on the accuser to prove his accusation—distinction between theft and robbery

The Appellant was found guilty by the Chief Alkali of Bornu of "attempting highway robbery and had one previous conviction." The appellant denied that he was a robber. One Kilbu stated that the appellant was a highway rober and that he (Kilbu) followed the appellant to cut off his head with a sword. At the next hearing he was asked why he drew his sword, and Kilbu replied that the appellant hit him with a stick. Kilbu was asked to produce witnessess. But no adjournment was granted to enable them to be produced, and without hearing any witness to support Kilbu's accusation the appellant's witnesses were asked what they knew. One witness said (*a*) that he found his sons preventing Kilbu from attacking the appellant with a sword, (*b*) that the appellant was his relative who had at one time lived with him, but that when he discovered that the appellant was a thief he had driven him away. The other witnesses said that they could not say that the appellant was not a thief. The Court then swore Kilbu on his statement, and found the appellant guilty.

Held:

upon the advice of the assessors, that in Moslem law, as in English law, it is not the duty of the accused to prove his innocence. The duty is upon the accuser to prove his accusation; and Kilbu had not proved against the appellant either that he was a robber or that he had hit him with a stick. There was some evidence that the appellant was a thief; but attempted highway robbery is an attempt to take something by violence or the threat of violence. This was not alleged by Kilbu.

Per Curiam:

There is a presumption that an accused person who denies an accusation is innocent, which makes it the duty of the accuser to prove his guilt; therefore, until the accuser has made out his case, there is no reason for hearing witnesses brought by the accused person; and when the accuser has not produced evidence to make out his case, the accused person must be discharged.

Obiter:

There seemed to be no reason why the trial Court swore the accuser on his statement.

CRIMINAL APPEAL

Appellant in person.

Bello, Crown Counsel, for respondent.

Brairamian S.P.J. (delivering the judgment of the Court): In the Native Court, the appellant was accused of highway robbery. One Kilbu of Wajiro stated that he was a highway robber between the complainant's town and the town of Mallam Ali Sugu, and that he, the complainant, followed him to cut off his head with a sword but was stopped. The appellant denied being a robber. The Native Court asked him and the complainant to produce witnesses.

At the next hearing the Court asked the complainant Kilbu why he drew his sword, and he answered that the appellant Goni hit him with a stick and that was why. The Court asked Kilbu whether he could produce witnesses, and he said yes, and he added that he knew Goni was a robber, that he stole goats and was a thief. The Court told Kilbu to produce witnesses and prove it in seven days.

There was, however, no adjournment for that purpose. Instead of that, although so far there was no evidence to support Kilbu's accusations, the Court asked Ali Sugu and the witnesses brought by Goni, the accused man, what they knew. Ali Sugu said he heard the noise and found his sons preventing the complainant from attacking Goni with his sword; also that Goni was a relative who lived with him at one time but, when he noticed that Goni was a thief, he drove Goni away; and the others stated they could not say that Goni was not a thief. The Court then, "taking into consideration" what Ali Sugu and the others said, swore Kilbu on his statement and pronounced judgment that "Goni Kinnami is guilty of attempting highway robbery and had one previous conviction" and sentenced him to two years. Against this decision Goni has appealed.

The judgment that Goni was guilty of attempting highway robbery means that Goni tried, by using violence, or by threatening to use violence, to take from Kilbu some article belonging to Kilbu. Kilbi never said so. What Kilbu said at first was that Goni was a highway robber and that on meeting him, he, Kilbu, chased him with a sword to cut off his head. It was at the second hearing, when the Court asked Kilbu why he drew his sword, that he said it was because Goni hit him with his stick. About this new story, the Court did not ask Goni whether it was true, nor was there any witness to support Kilbu. Goni tells us he had no stick with him. The Court could have asked Ali Sugu whether Goni had a stick, but did not ask him. The Court

Kinnami v. Bornu N. A. — Bairmian S. J.P

told Kilbu to produce witnesses to prove his accusations, but never waited for those witnesses to be brought by Kilbu.

We wish to remind Courts of trial that when a person is accused of an offence, he is presumed to be innocent. That was so in Roman law, it is so in English law, and it is so, we are advised, in Moslem law too. This presumption of innocence lays the duty on the accuser to produce witnesses to prove his accusation, and this presumption and the accuser's duty must always be borne in mind. It is not the duty of the accused person to prove his innocence; it is the duty of the accuser to prove his guilt; therefore, until the accuser has made out his case, there is no reason for hearing witnesses brought by the accused person. When the accuser has not produced evidence to make out a case for an accusation which is denied by the accused person, the accused person must be discharged. The Court ought not to have asked either Ali Sugu or the other witnesses brought by Goni anything; for Kilbu had not proved anything against Goni, either that he was a robber or that Goni hit Kilbu with a stick. We do not understand why the Court swore Kilbu on his statement or why the Court found Goni guilty of attempting highway robbery. The only evidence there was —it was evidence which the Court did wrong to bring out from the witnesses of the accused person, as we have explained—but the only evidence there was before the Court was that Goni was a thief. A thief is a person who steals: it means taking what belongs to another without his consent, but the taking is without violence; stealing is usually done secretly. For robbery there must be violence or the threat of violence.

The fact is that Goni, who went to prison once, as he says for theft, was punished a second time for no reason at all and without evidence to prove that he did anything beyond being on the road. If anyone did wrong, it was Kilbu, who wanted to kill him. Goni says it was on Kilbu's complaint that he went to prison for theft. He was punished for that theft, and that should be enough. We hope that Kilbu will be advised not to molest Goni again when he finds Goni going peacefully along the road.

The appeal is allowed.

Appeal allowed.

(*Editorial note:*

Compare this decision with the decision in *Gani Bauchi v Alkali Mallam Mamudu*, 1956, N.R.L.R. 40, where the accuser alleged that the appellant had assaulted him but, as in the above case, called no witnesses; and the case was not proved. On the other hand, in *Baba Ibrahim v Dikwa Native Authority*, 1956, N.R.L.R. 43, the accuser called no witnesses, but the case was proved by the refusal of the accused to take the oath, which shifted the oath to the accuser.)

D. N. CHIMEZIE *v* JOHN DIKE

[C. A. (Sir Algernon Brown C. J.; Smith J.) November 17, 1956]

[Kaduna—Civil Appeal (Case Stated) No. Z/17A/1956]

Case stated under section 110 *Magistrates' Courts (Northern Region) Law—order by native court for payment of compensation in a criminal proceeding—sum awarded paid into native court but not taken out of court—section* 20 *Native Courts Ordinance—subsequent action for damages in Magistrate's Court—submission that action was barred.*

The defendant was prosecuted in the Mixed Court, Kaduna, for assaulting the plaintiff. He pleaded guilty; he was fined £10, and he was ordered to pay £5 compensation. The defendant paid the £5 into court, but the plaintiff refused to accept it. The plaintiff subsequently brought a civil action for damages in the Magistrate's court, and upon the facts the Chief Magistrate found that the defendant had assaulted the plaintiff with considerable severity. But, believing that he was bound by two reported decisions he held that the plaintiff's action was barred, and stated a case under section 110 of the Magistrates' Courts (Northern Region) Law.

Held:

(1) The two decisions which the Magistrate followed were each based upon a statutory enactment which (*a*) empowered the court to make an order for payment of compensation, and (*b*) provided that the receiving of such compensation was a bar to further proceedings.

(2) Section 20 of the Native Courts Ordinance does not empower the court to make an order for the payment of compensation; and that the two authorities were therefore not applicable;

(3) The plaintiff's claim for damages was not barred.

Cases referred to:

John Mark v Sampson Toe, 2 W.A.C.A. 170, distinguished.

Sampson Ikubaiyeje v Agnes Reis, XVII N.L.R. 12, distinguished.

CASE STATED

Razaq for plaintiff.

Balogun for defendant.

Chimezie v. Dike

Brown C. J.

Brown, C. J. (delivering the judgment of the Court):—This is a case stated by the Chief Magistrate, Kaduna, in which the plaintiff claimed damages for assault. The learned Magistrate at page 2 of his judgment had no hesitation in finding not only that the defendant assaulted the plaintiff, but that it was an assault of considerable severity.

At page 4 of the judgment he would have awarded the plaintiff £75 general damages and £49-9-0*d* special damages, making a total of £124-9*s*-0*d*, and he would also have awarded costs. But he felt constrained to find for the defendant on a point of law, and he has stated this case for our consideration under section 110 of the Magistrates' Courts (Northern Region) Law. The facts, so far as they are material to the case stated, are that the defendant was prosecuted for the assault before the Mixed Court, Kaduna. He pleaded guilty; he was fined £10, and he was ordered to pay £5 compensation in addition. But the plaintiff refused to accept the £5, which the defendant paid into Court. The evidence, both of the plaintiff and the defendant, agreed upon those facts, and their evidence is quoted at page 4 of the judgment.

The plaintiff then brought a civil action for damages before the Chief Magistrate. The learned Magistrate considered that he was bound by two authorities which he thought were applicable to this case, and in applying these two auhorities he held that the plaintiff's action was barred because when the money was paid to the court the plaintiff must be deemed to have received it.

The first authority is the case of *John Mark v Sampson Toe*, which is reported in 2 W.A.C.A. page 170, in which it was held that compensation was received when an award giving the opportunity to receive payment was made. The second authority is the case of *Sampson Ikubaiyeje v Agnes Reis*, which is reported in XVII N.L.R. at page 12. But in each of these cases the court's decision was based upon a satutory enactment which provided for compensation to be awarded, the object of which was to stop multiplicity of proceedings, and to prevent unnecessary litigation. We have to see if, in the present case, there is any statutory enactment similar to the statutory enactments which are quoted in those two authorities, which is applicable to this case.

In the case of John Mark, the statutory enactment was section 75 of the Criminal Code of the Gold Coast, which reads as follows:—

> "Where any person who is injured by any offence punishable under this Code or under any other statute receives compensation for such injury under the order of the court, or where the offender

having been ordered to make such compensation suffers imprisonment for non-payment thereof, the receipt of such compensation or the undergoing of such imprisonment, as the case may be, shall be a bar to any action for the same injury; but, except as aforesaid, nothing in this code shall bar the action of any person in respect of any injury sustained by him or his property."

So there we have a statutory enactment providing for the payment of compensation and saying that payment of compensation operates a bar to a further action.

In the case of Sampson Ikubaiyeje the statutory enactment in question was section 18 (13) of the old Criminal Code of Nigeria, and that section is no longer law. The material part of that section is as follows:—

"Where any person receives compensation for an injury under the order of the court as above-mentioned, or where the offender, having been ordered to mke compensation, suffers imprisonment for non-payment thereof, the receipt of such compensation or the undergoing of such imprisonment, as the case may be, shall be a bar to any action for the same injury."

There again we have a statutory enactment providing for an award of compensation, which is to be a bar to any further action when the person has received the compensation. And the reasons for both those decisions was that the intention of the enactments was to avoid multiplicity of proceedings, and that when compensation has been paid, even though it has only been paid into court and not received by complainant, nevertheless it operated as a bar to any further proceedings. But in the present case, is there any statutory enactment providing for the payment of compensation and saying that it shall operate as a bar to any further proceedings?

The Ordinance which is applicable to the Mixed Court of Kaduna is the Native Courts Ordinance. There is no provision in the Native Courts Ordinance to make an award for the payment of compensation, and therefore it would appear—and I say this appreciating that there is no appeal from this order of the Mixed Court—that their order for the payment of £5 compensation was an illegal order. The material section is section 20, which deals with fines which they have power to impose, and section 20 reads:—

"A Native Court may direct any fine or such part thereof, and any amount or otherwise as it shall deem fit, to be paid to the person injured or aggrieved by the act or omission in respect of which such fine has been imposed, on condition that such person, if he shall accept the settlement, shall not have or maintain any suit for

Chimezie v Dike

Brown C. J.

the recovery of damages for the loss or injury sustained by him by reason of such act or omission."

But in fining the defendant in this case, they made no order that part of the fine should be paid to the plaintiff. The fine was something quite distinct from the order for the payment of compensation. They fined the defendant £10 with no conditions attached to it; they also made an order that, in addition to the fine, the defendant should pay the plaintiff £5 compensation. But the section gives no power to award compensation. Therefore, it would appear to be an illegal order so far as the payment of £5 compensation is concerned.

In this case there is no statutory enactment relating to compensation and shewing an intention to avoid multiplicity of proceedings by making *payment of compensation* act as a bar to further proceedings, such as there was in the two authorities which were cited by which the learned Chief Magistrate considered he was bound. Therefore it seems to us that the order of the learned Magistrate dismissng the plaintiff's claim must be set aside. In its place there must be an order giving judgment for the plaintiff for £124-9*s*-0*d*, which is the amount which the learned Magistrate would have awarded upon the facts, and the plaintiff must be given costs here and in the court below. We award twenty-five guineas costs in the court below and five guineas as costs in this court.

REGINA *v* USUMAN PATEGI AND ORS

[High Court (Smith J.) November 19, 1956]
[Ilorin-Trial upon Information—No. K/9C/1956]

Criminal Law and procedure—Autrefois acquit—First accused tried and acquitted in Native Court—District Officer purporting to set aside a judgment of acquittal and transferring case to the Magistrate—s. 28 (1) (*b*) *Native Courts Ordinance cap.* 142—*Accused committed for trial—Pleading Not Guilty on arraignment—No plea in bar—Counsel submitting at close of case that accused should not be tried twice—s.* 16 *Criminal Code No.* 15 *of* 1916—*Section repealed by s.* 7 *Criminal Code (Amendment) Ordinance No.* 43 *of* 1945, *s.* 181 *Criminal Procedure Ordinance cap.* 43—*Not "liable" to be tried again for the same offence—Distinction between that and 'shall not be tried again for the same offence'—effect of failure to plead in bar—Second and third accused —Whether ever in peril before Native Court.*

Official corruption contrary to s. 98 *Criminal Code—Scope of section —Extortion under s.* 406—*Offences contrasted—Test to be applied under s.* 406.

Accomplices vel non—Whether victims of extortion are accomplices in crime.

Moslem Law—Procedure—Need for complainant—Second and third accused merely witnesses before Alkali—On being inculpated by evidence of other witnesses accused allowed to take the oath—Discharged—Whether amounting to acquittal.

Native Courts—Transfer—District officer purporting to set aside a judgment of acquittal and transfer the case to the Magistrate's Court—Purported action under s. 28 (1) (*b*) *Native Courts Ordinance cap.* 142—*Whether power to set aside acquittal conferred by that section—Construction —s.* 28 (10) *cap.* 142—*s.* 25 (1) (*c*) *Native Courts Ordinance No.* 44 *of* 1933—*This section now s.* 28 (1) (*c*) *cap.* 142—*Ordinance No.* 16 *of* 1936 —*Ordinance No.* 8 *of* 1938—*Validity of Order of District Officer.*

The following facts are taken from the judgment:—

The first accused was employed as a forest guard with the duty of inspecting farms in order to check contraventions of the forestry laws. As he was new to the area, the second and third accused were instructed to act as his guides. The second accused accompanied him to the villages of B, A, and E; the third accused to the villages of L and X.

In the village of B, the second accused told the villagers that they should give the first accused "plenty of money" so that he might not

arrest them. They were given £1-2*s*-6*d*. In the village of A, "entertaining money" was demanded, failing which the villagers were told that they would be taken before the Alkali for cutting trees. 6*s* was given to the second accused, who handed it to the first accused. In the village of E, 12*s* 6*d* was produced, the villagers being told by the second accused that if they did not pay the first accused would allege that they had cut trees and would take them to court. In the villages of L and X, which the first accused visited with the third accused, the same procedure was adopted; 6*s* was received from the village of L and 7*s* 6*d* from the village of X. In none of the five villages were any farms inspected.

Arising out of these facts, the first accused was tried for various offences by the Chief Alkali of Ilorin. He was acquitted. The second and third accused were present at the proceedings, and in the course of them they took the oath; they were not themselves on trial. The proceedings before the Chief Alkali were set aside by the District Officer, who exercised his powers under section 28(1)(*b*) of the Native Courts Ordinance and ordered a retrial before the Magistrate. The Magistrate held a preliminary enquiry, at which the second and third accused were jointly charged with the first accused, and all three accused were committed for trial on information before the High Court.

Held:

(1) That the witnesses for the Crown met the demands of the accused because they feared the threat to prosecute; the accused took the money fraudulently with intent to deprive the owners permanently of it; the accused were therefore guilty of extortion under section 406 of the Criminal Code.

(2) That the facts did not support a conviction for corruption under section 98 of the Criminal Code.

(3) That the witnesses for the Crown were the victims of the crime of extortion, and were not accomplices.

(4) That the words "set aside the conviction and sentence" in section 28(1)(*b*) of the Native Courts Ordinance are clear and precise, and do not include an acquittal.

(5) That although the plea in bar of *autrefois acquit* might have been open to the first accused, by pleading generally to the charge he put himself upon his trial by virtue of section 217 of the Criminal Procedure Ordinance.

(6) That the second and third accused were never in peril before the Native Court, and the plea of *autrefois acquit* was not open to them.

Quaere:

Whether an accused person who has pleaded generally to the charge, can withdraw his general plea and substitute a plea in bar after the prosecution has begun to lead evidence.

Cases referred to:

Biobaku v Police, XX N.L.R. 30 followed;

Yusufu Tudun Wada and Another v Inspector General of Police, 1957 N.R.L.R. 1 followed;

Rex v Ilena Bernhard, 26 Cr. App. R. 137 applied;

Okeke v Commissioner of Police, 12 W.A.C.A. 363 followed;

Police v Edu, 14 W.A.C.A. 163 applied;

Rex v Otio Enwa, 9 W.A.C.A. 194 distinguished;

Umaru Mafindi v Bauchi Native Authority, 1956 N.R.L.R. 41 followed.

TRIAL UPON INFORMATION

McLean, Crown Counsel, for the prosecution.

Rasaq for the first accused.

Smith, J. stated the facts and continued: The first two counts of the information allege offences of corruption contrary to subsections 98(1) and 98(2) of the Criminal Code, but the evidence in support of these counts is, however, evidence of extortion. The scope of section 98 was considered by Bairamian J. in *Biobaku v Police*, XX N.L.R. 30 where the learned judge held:

"the mischief aimed at in s. 98 of the Criminal Code is the receiving or the offering of some benefit as a reward or inducement to sway or reflect a person employed in the public service from the honest and impartial discharge of his duties—in other words as a bribe for corruption or its price; but the facts in the case amounted to official extortion and it was wrong to convict the appellant of an offence under subsection (1) of section 98 on those facts."

I respectfully agree with the view expressed by that learned judge and find that the evidence on the first and second counts of the information does not support a conviction for bribery under section 98 but indicates extortion.

The remaining counts of the information are framed under section 406 of the Criminal Code. The test to be applied to the evidence on these counts is set out in the judgment of the High Court of the Northern Region in *Yusufu Tudun Wada and Another v Inspector General of Police* 1957 N.R.L.R. 1, where the Court held that:

"an intent to steal is an ingredient in our section 406, as it is in the English section; that test applies in Nigeria also, provided that a case in Nigeria is viewed in the light of its own law of stealing."

and the following passage from *Rex v Bernhard* 26 Cr. App. R. 137 at p. 145 was referred to:

> "The test is whether, if the money had been obtained it would have been in such circumstances that it could properly have been said to have been stolen: see *Walton* (1863) 9 Cox 268."

I do not doubt that the witnesses for the Crown met the demands made by the accused person because they feared the threat to prosecute. The accused person took the money fraudulently with the intention of depriving the witnesses of their money permanently. Second and third accused later attempted to refund the money after the police had started making investigations; but at the time they took the money the only inference to be drawn from the evidence is that they intended to keep it.

Counsel for first accused submitted that all the witnesses for the Crown were accomplices whose evidence required to be corroborated. It is well established that, in cases of extortion, the person who pays the money is a victim not an accomplice. *In Okeke v Commissioner of Police*, 12 W.A.C.A. 363 which was a case of official extortion, their Lordships said "it is quite untenable in argument that those who met the monetary demand of the appellant were accomplices to the demand. Nor, in meeting the demand, could they be regarded otherwise than as victims of the appellant's rapacity." In the present case the witnesses for the Crown were victims not accomplices. They met the demands of the accused person because they feared the threat to prosecute.

The first accused was tried for offences arising out of the same facts before the Chief Alkali of Ilorin and acquitted. These proceedings before the Chief Alkali were set aside by the District Officer who made an order of retrial before the Magistrate. Fresh proceedings were commenced in the Magistrate's Court and the second and third accused were charged jointly with first accused. The Magistrate held a preliminary inquiry and committed all the accused persons for trial before the High Court. The order of retrial by the District Officer was in the following terms:

> "In exercise of the powers conferred upon me by section 28 (1) (*b*) of the Native Courts Ordinance I hereby order that the judgment of the Chief Alkali's Court be set aside and the case be retried before the court of the Magistrate Grade I Ilorin."

It has been submitted that this order of retrial was null and void because the District Officer had no power to order a retrial after an acquittal. He purported to make the order under sub-section 28 (1) (*b*) of the Native Courts Ordinance which reads:

"(1) Every Resident and District Officer shall at all times have access to native courts both of first instance and of appeal in his province or division as the case may be, and may of his own motion or, in his absolute discretion on the application of any person concerned:—

(*b*) set aside the conviction and sentence, or judgment or other order of a native court and order any case to be retried either before the same native court or before any other native court of competent jurisdiction or before the High Court or before any magistrate's court . . . . ."

Counsel for the Crown expressed the view that, as regards criminal matters, this sub-section only gave a District Officer the power to set aside a conviction and sentence and to order a retrial where he thought the conviction was bad.

The question is: Do the words "set aside the conviction and sentence, or judgment or other order of a native court" include the setting aside of an acquittal? The only express reference to an acquittal in section 28 is in sub-section (10) which reads:—

"Where any cause or matter is transferred to a native court or to a magistrate's court or to the High Court under paragraph (*c*) of sub-section (1) such court may take any course with regard to the cause or matter which it considers justice requires. The power conferred by this sub-section includes the power to increase a sentence, but this sub-section shall not be deemed to empower the court to try a person for an offence of which he has been acquitted."

Sub-section (10) only deals with paragraph (*c*) of sub-section (1); and in order to understand its effect it is necessary to look into the history of both these sub-sections.

When the Native Courts Ordinance was passed in 1933, what is now sub-section 28 (1) (*c*) was sub-section 25 (1) (*c*) and it read:

"25 (1) Every . . . District Officer . . . of his own motion may—

(*c*) order the transfer of any cause or matter either before trial or at any stage of the proceedings whether before or after sentence is passed or judgment is given, to another native court or to a magistrate's court or to the High Court."

At that time sub-section (10) did not exist. It was added as sub-section (9) by Ordinance No. 16 of 1936 and it said "this sub-section shall not be deemed to empower the court to try a person for an offence for which he has been acquitted." In 1938, by Ordinance No. 8 of that year, the words, "whether before or after sentence is passed or judgment is given" were deleted from sub-section (1) (*c*) and the power of

Regina v Pategi and Ors

Smith J.

transfer became restricted to "before trial or at any stage of the proceedings." Sub-section (10) then became redundant but has not been repealed.

As regards sub-section (1) (*b*), the words "set aside the conviction and sentence" in this sub-section are clear and precise and do not include an acquittal. An order setting aside an acquittal is a serious encroachment on the liberty and rights of the subject. If the legislature had intended to give such a power to a district officer it would have said so plainly. It would not have left it to be implied from the words "judgment or other order" particularly when the sub-section is giving him power to review *any* proceedings whether civil or criminal. The legislature in 1936 found it necessary, by introducing what is now sub-section (10), to make it quite clear that an order of transfer by a district officer of a criminal case from a native court under sub-section (1) (*c*) did not empower the court to which the case was transferred to try a person for an offence of which he had been acquitted. This shows that the legislature did not intend to include an acquittal in sub-section (1) (*c*). It has not expressly given the power to a district officer to set aside an acquittal under sub-section (1) (*b*); and I am of the opinion, having regard to the wording of this sub-section, that the granting of such a power is not to be implied. I find that the order of the District Officer was null and void.

There is a point of evidence as to the copy of the order of retrial which was tendered in this case, to which I would refer. The copy order is not signed nor is it a certified copy. Instead of a signature there is the name of what purports to be that of a district officer stamped on the copy order. The order which the Magistrate received has not been produced. To prove that an order of retrial had been made it was necessary to produce either the original or a certified copy of the order in accordance with sections 110 and 111 of the Evidence Ordinance. This was not done in the present case; and I mention this matter purely as a point of evidence for future guidance.

As I have found that the order of the District Officer was invalid, I have now to consider the position as if that order had never been made. This Court has jurisdiction to try all criminal offences subject to the provisions of the Criminal Procedure Ordinance. Counsel for first accused indicated during the trial that he wished to make a submission of *autrefois acquit* after first accused had given evidence. At the close of the evidence Counsel for the Crown put in certified copies of the record of proceedings of the trials of the first accused before the Chief Alkali of Ilorin. On arraignment before this Court the first accused made the general plea of not guilty to the offences in the information and later,

after the information had been amended, again pleaded not guilty. He did not make a special plea in bar. This point was considered in the case of *Police v Edu*, 14 W.A.C.A. 163 at p. 165, where their Lordships said:

> "In regard to what we have described as the question of *autrefois acquit* it would seem that the submission made by Counsel for the appellant in the trial court was made too late. We are aware of the observations made by Lord Goddard, C.J., in *Flatman v Light* but in Nigeria the point is governed by the Criminal Procedure Ordinance (Cap. 43), which provides in section 217 that,
>
> > 'Every person by pleading generally the plea of not guilty shall without further form be deemed to have put himself upon his trial.'
>
> The appellant had pleaded not guilty and put himself upon his trial, and although his plea of not guilty was still there and his trial had begun and some evidence had been given, his Counsel made the submission that he could not be tried again. Under s. 221 of the Ordinance,
>
> > 'Any accused person against whom a charge or information is filed may plead—
> >
> > (*a*) that he has been previously convicted or acquitted, as the case may be, of the same offence.'
>
> Then if the plea is denied the court shall try whether it is or is not true in fact and if the court holds that the facts alleged by the accused do not prove the plea, or finds that the plea is false in fact, the accused shall be required to plead to the charge or information. The wording indicates that it must be the accused person himself who should plead this plea in bar, and section 221 contemplates that it must be pleaded before pleading not guilty to the charge. In this case it was not the accused who made any plea at all but his Counsel who made a submission, as we have said after the accused had put himself on his trial by pleading not guilty. It would seem, therefore that there was not in this case any plea in bar for the Magistrate to consider."

What happened in the case of *Police v Edu* is similar to what has happened in this case. The first accused did not make a plea in bar, but his Counsel made a submission. Counsel's submission is in effect that the first accused should not be tried twice for the same offence. Counsel for the Crown referred to the case of *Rex v Otio Enwa*, 9 W.A.C.A 194, where, during a trial for rape, the trial judge discovered that the accused had been tried for adultery in the Native Court on

Regina v Pategi and Ors

Smith J.

the same facts, found guilty and sentenced. The trial judge, in a case stated, asked whether he had jurisdiction to try and convict the accused of the felony of rape. Their Lordships held:—

> "Now section 16 of the Criminal Code prescribes that a person cannot be twice punished either under the provisions of the Code or under the provisions of any other law for the same act or omission. The trial before tha native court, whatever the offence may have been called there, was for the same act, and he has been punished for it. Accordingly we answer the question submitted to us in the negative."

Section 16 of the Criminal Code was repealed by section 7 of the Criminal Code (Amendment) Ordinance of 1945, and the law on this point is now to be found in section 181 of the Criminal Procedure Ordinance, which provides:—

> ".....a person who has once been tried by a court of competent jurisdiction for an offence and acquitted or convicted of such offence shall not, while such an acquittal or conviction remains in force, be liable to be tried again for the same offence....."

It is to be observed that the words of this section are "shall not..... *be liable* to be tried again for the same offence" and *not* "shall not be tried again for the same offence".

The first accused was tried before the Chief Alkali of Ilorin for offences contrary to "section 76 *Muhutasari II* of the Mohammedan Law". The Court of the Chief Alkali was a court of competent jurisdiction. The particulars of the offences and the evidence adduced in support thereof before the Chief Alkali are similar to the particulars of offences in the informations and the evidence adduced in this Court. Before the Chief Alkali the first accused was acquitted of each offence. The reason for the acquittal would appear to have been that the minimum proof—that is the evidence of two eye witnesses—required by Moslem Law—was not forthcoming. The offences to which the first accused has pleaded in this Court are in substance the same offences as those before the Chief Alkali within the meaning of section 181 of the Criminal Procedure Ordinance. But though first accused is not liable to be tried again for the same offence, he is, by pleading generally to the charge, deemed to have put himself upon his trial by virtue of section 217 and thereby has submitted himself to the jurisdiction of this court. He has by pleading 'not guilty' surrendered his right to say that he is not liable to be tried again, and the trial must proceed. Whether he can withdraw his general plea and substitute a plea in bar after the evidence has started is a question; but Edu's case would appear to suggest that he cannot. In the present case no application was made by

first accused to withdraw the general plea of not guilty at any time and the case against him must therefore be decided according to the evidence.

Both second and third accused, when pleading not guilty to the offences in the information, added that they had taken the oath before the Alkali. Both accused were present during the trials of first accused before the Chief Alkali, Ilorin. In three of these trials a witness alleged that he gave the money to second accused to be handed to first accused. The Chief Alkali asked second accused if this was true. Second accused answered that it was not and he was then asked by the Chief Alkali, in each instance, to take the oath, and this he did. In the two other trials of first accused before the Chief Alkali a similar allegation was made against third accused and he likewise took the oath. Before there can be a trial in Moslem Law there must be a complainant who makes a complaint. *Umaru Mafindi v Bauchi Native Authority*, 1956 N.R.L.R. 41. The Native Authority Police were the complainants before the Chief Alkali of Ilorin and their complaints were against the first accused only. Neither the second nor the third accused was on trial in the court of the Chief Alkali.

They are being tried for the first time in this Court. Each pleaded not guilty and the case against each of them has to be decided on the evidence.

All accused guilty of extortion. 1st accused sentenced to two years' imprisonment. 2nd and 3rd accused sentenced to one year's imprisonment.

AYUBA DAN RUFAI FAGOJI *v* KANO NATIVE AUTHORITY

[C.A. (Brown C.J., Bairamian S.P.J., Smith J.) September 8, 1956]

(Assessors: M. Muhammadu Bello, Wali of Katsina, M. Ahmadu Dan Masani, Muftin Majalisar Katsina)

[Kano—Criminal Appeal No. K/93A/1955]

Conviction for homicide in Moslem Court—Sentence of death—Powers of High Court under section 67 *Native Courts Law*, 1956, *where evidence upon the record suggests manslaughter under the Criminal Code—section* 4 *Criminal Code Ordinance, Cap.* 42—*section* 10A *Native Courts Ordinance, Cap.* 142—*section* 67 (2) *Native Courts Law*, 1956.

Previous decisions—circumstances in which Court not bound to follow previous decisions said to be given per incuriam (*a*) *of its own*, (*b*) *of a superior Court.*

The appellant was convicted of intentional homicide ('amd) in the Court of the Emir of Kano and sentenced to death. By Maliki Law the conviction and sentence were correct.

The evidence of the appellant, which he gave at the trial, was conflicting. In one part of his evidence he alleged that he struck the deceased in circumstances which might suggest provocation under the Criminal Code.

It was contended for the appellant that the High Court of the Northern Region, sitting in its appellate jurisdiction, was bound to apply the provisions of the Criminal Code, and that where the evidence in a homicide case before a native court disclosed facts which might amount to the offence of manslaughter under the Criminal Code, they should either alter the finding to one of manslaughter or order a retrial before the High Court. For the respondent it was argued that by virtue of the statutory provisions which were applicable to this matter, and by virtue of authoritative decisions, the High Court was precluded from altering the finding and the sentence of a Moslem court if they were correct in Maliki law. It was further submitted that the Criminal Code does not apply to all persons in Nigeria, and that the Native Court was bound to apply native law and custom and was precluded from trying the case under the Criminal Code. Lastly, it was argued that on the facts of this particular case there was no evidence of provocation which would reduce the crime of murder to manslaughter under the Criminal Code.

Held:

(1) The Criminal Code applies throughout Nigeria;

Fagoji v. Kano N.A. Brown C. J.

(2) by section 10A of the Native Courts Ordinance, native courts are given "dispensation" from what otherwise would have been their obligation to try offences under the Criminal Code, and are permitted to try offences against native law and custom in accordance with their own native law:

(3) this "dispensation" does not apply to the High Court in hearing an appeal from a native court; and by re-enacting sub-section (2) of section 40A of the Native Courts Ordinance as section 67 (2) of the Native Courts Law, 1956, "the Legislature of the Northern Region has maintained the safeguard which the Legislature has insisted upon maintaining since 1948";

(4) the High Court, sitting in its appellate jurisdiction from Moslem court in a homicide case, is required to consider the question of manslaughter;

(5) if the record discloses facts which might substantiate manslaughter under the Criminal Code, the High Court will order a retrial under the Criminal Code;

(6) upon the facts of this case there was no evidence of provocation which could reduce the offence to manslaughter under the Criminal Code.

Cases referred to:

Tsofo Gubba v Gwandu Native Authority, 12 W.A.C.A. 141 considered;

Jalo Tsamiya v Bauchi Native Authority, unreported decision of the High Court of the Northern Region in 1956, not followed;

Garo v Bornu Native Authority, 14 W.A.C.A. 587 not followed;
Young v Bristol Aeroplane Company Limited, (1944) 1 KB 718; (1946) 1 AER 98 H.L. applied.

CRIMINAL APPEAL

Lewis Thomas for the appellant.

H. H. Marshall, Q.C., Attorney-General, and *Mallam Nasir*, Crown Counsel, for the respondent.

Brown, C. J.: This appellant was convicted of homicide in the Emir of Kano's court on the 14th of June and was sentenced to death. By Maliki law both conviction and sentence were correct.

The appeal first came before Mr Justice Bairamian and Mr Justice Smith at Kano on the 3rd of July. Mr Lewis Thomas, on behalf of the appellant, then submitted that the Criminal Code applied and that the evidence showed that the appellant was guilty of

man slaughter, but not of murder, upon the ground of provocation. Mr Nasir, on behalf of the respondent, conceded that the Criminal Code applied. The Court at Kano was not prepared to accept that concession without further argument; and they reserved this appeal for hearing before three Judges in Kaduna. In so doing they framed three questions, which read as follows:—

"(1) Whether the Criminal Code applies in hearing the appeal;

(2) On the law of manslaughter under the Criminal Code;

(3) On what should be done in this case."

In this Court we have had the advantage of hearing the Attorney-General, who leads Mr Nasir on behalf of the respondent.

Having regard to the great importance of the first question it will be convenient if I approach it from a consideration of its history.

By the Criminal Code Ordinance of 1916 a native tribunal was excluded, by section 4, from the application of the Criminal Code. By section 2 of Ordinance 56 of 1933 the words "other than a native tribunal" were deleted from section 4 of the Criminal Code Ordinance. In 1947 the case of *Tsofo Gubba v Gwandu Native Authority* (12 W.A.C.A. 141) decided that by section 4 of the Criminal Code Ordinance, as amended by the 1933 Ordinance, the Criminal Code applied to proceedings in Native Courts and that no person was liable to be tried or punished in a Native Court for an offence against the Criminal Code except under the express provisions of that Code. In 1948—no doubt in order to meet the situation which the *Tsofo Gubba* case had brought to light—the Native Courts Ordinance, 1948, was enacted. By section 3 of that Ordinance it was provided that—

> "notwithstanding anything contained in the Criminal Code Ordinance, when any person is charged with an offence against native law or custom, a native court may try the case in accordance with native law or custom even though the act or omission constituting the offence may also constitute an offence under the provisions of the Criminal Code or of any other enactment."

But, it is to be observed, that the words "other than a native tribunal" were not restored to section 4 of the Criminal Code Ordinance, and have not been restored to this day. By section 5 of the 1948 Ordinance it was provided that in cases of homicide before a native court a Judge of the Supreme Court should be required to review the case; and if, on a perusal of the record, "a Judge of the Supreme Court was satisfied that, by reason of the application to the case of native law or custom, the decision of the court of first instance is not satisfactory having regard to the provisions of the Criminal Code applicable in the circumstances, he should, by order, set aside the decision." Then the section set out his powers, of which the following are material to the matter under discussion—

Fagoji v. Kano N.A.

Brown C. J.

"(*b*) direct the retrial of the convicted person before the Supreme Court for an offence against the Criminal Code;

(*c*) when the convicted person has been sentenced to death, substitute for the decision of the court of first instance a conviction for manslaughter and pass sentence accordingly."

Pausing there, I wish to make two observations. The first is that, because in Moslem law no distinction between murder and manslaughter is known, the court of first instance would not have investigated the case from the aspect of whether there was evidence (e.g., of provocation) which would reduce the crime to mansluaghter. Hence the Judge's power under (*c*) to "substitute for the decision of the court of first instance a conviction for manslaughter", *after perusing the record*, was not in all cases appropriate. The question is essentially one of evidence, which in the native court would not have been investigated from that aspect. Only in a clear case would the Judge have acted under (*c*). In a case of doubt he would have acted under (*b*). My second observation is that the two powers which I have quoted from section 5 were given to the Judge to exercise in his duty to *review* the case, i.e., on a perusal of the record; they were not the powers which were given to the Supreme Court in the exercise of its appellate jurisdiction under section 4. The power to "substitute for the decision of the court of first instance a conviction for manslaughter"—without a retrial—finds no place in section 4. But by sub-section (2) of section 4 a most important new provision was introduced. This sub-section is the heart of this question which I am now considering. Sub-section (2) of section 4 of the Native Courts Ordinance, 1948, was as follows:—

"(2) Any powers conferred by sub-section (1) of this section may be exercised notwithstanding that the verdict of the court of first instance was correct by native law and custom."

Thus in a case of a conviction for homicide, which a native court had correctly determined by native law or custom but which suggested manslaughter under the Criminal Code, there were two safeguards: where there was an appeal, the appellate court could act under section 4 (1) (*b*) (*ii*) or (*iii*) coupled with sub-section (2); and in a case where no appeal was lodged the Judge could act under section 5 (2) (*b*) or (*c*). I desire to emphasise the insistence of the Legislature, at this stage, upon providing safeguards.

The next stage in the history of this matter was reached in 1951. The Native Courts (Amendment) Ordinance of that year repealed the Native Courts Ordinance, 1948; and in repealing it the Judge's duty to review trials for homicide in native courts was removed. But it re-enacted, as section 40A of the Native Courts Ordinance, the powers of the Supreme Court in its appellate jurisdiction which were contained in sub-sections (1) and (2) of section 4 of the 1948 Ordinance. They thus preserved the safeguard in a case where an appeal had been lodged,

discarding it in a case where no appeal was lodged. It also re-enacted section 3 of the 1948 Ordinance (which empowered native courts to try cases under native law or custom, notwithstanding anything contained in the Criminal Code) as section 10A of the Native Courts Ordinance, with the following proviso:—

> "Provided that where an act or omission constituting an offence against native law or custom also constitutes an offence under the provisions of the Criminal Code or of any other enactment, a native court shall not impose a punishment in excess of the maximum punishment permitted by the Criminal Code or such other enactment."

Finally, by section 67 of the Native Courts Law, 1956, the legislature of the Northern Region conferred upon this High Court, sitting in its appellate jurisdiction, certain powers which are similar to those contained in sub-section (1) of section 40A of the Native Courts Ordinance; and it re-enacted, in identical terms, the provisions of sub-section (2).

The history of this matter, in its bearing upon the question which I am considering, can now be summarised as follows:—

(1) Up to 1933 native courts were excluded from the application of section 4 of the Criminal Code Ordinance.

(2) In 1933 section 4 was applied to them.

(3) In 1947 the situation thus created was brought to a head in the *Tsofo Gubba* case.

(4) In 1948 the Legislature met the situation—

(*a*) by empowering native courts to try offences by native law and custom, notwithstanding the Criminal Code;

(*b*) by imposing upon a Judge of the Supreme Court the duty of reviewing every case of homicide which had been tried in a native court, (I use the word "duty" advisedly, in the light of the decision in *The King v Usuman Acida*, W.A.C.A. Selected Judgments January-May, 1950, page 71);

(*c*) by conferring upon the appellate Court the powers contained in sub-sections (1) and (2) of the 1948 Ordinance;

(*d*) by leaving section 4 of the Criminal Code Ordinance as it then was; that is to say, it did not restore the words of the 1916 Ordinance "other than a native tribunal", and it thus left the section to apply to native courts.

(5) By the 1951 Ordinance the duty of a Judge of the Supreme Court to review cases of homicide was removed. Thus one safeguard was abandoned. But by introducing section 40A into the Native Courts Ordinance it preserved the other safeguard by leaving the Supreme Court with the same appellate

powers as had been contained in section 4 of the 1948 Ordinance, including the power contained in sub-section (2). And in a case where an offence under native law and custom was also an offence under the Criminal Code, by introducing the proviso to section 10A, it limited the punishment which the native court could inflict to a punishment which was not in excess of the punishment provided by the Criminal Code.

(6) The power which has been given to the appellate court by sub-section (2) of section 67 of the Northern Region Native Courts Law, 1956, is identical with the power which the appellate court has had since 1948. Thus the safeguard has been maintained.

The question now arises: how does the provision contained in section 4 of the Criminal Code Ordinance that "no person shall be liable to be tried or punished in any court in Nigeria for an offence except under the express provisions of the Code" fit in with section 10A of the Native Courts Ordinance which empowers a native court to try a case under native law or custom notwithstanding anything contained in the Criminal Code? I think that the answer is to be found in sub-section (2) of section 40A of the Native Courts Ordinance, which in the Northern Region is sub-section (2) of section 67 of our Native Courts Law. By section 10 of the Native Courts Ordinance (section 22 of our Native Courts Law, which section has not yet been brought into operation) a native court has power to try an offence under native law or custom. A Moslem court is thus not required to apply a law which is not its own. But notwithstanding that its decision is correct by native law and custom, the High Court, by sub-section (2) of section 40A (section 67 of our Law), is expressly given power to exercise the powers conferred upon it by sub-section (1).

The Attorney-General approached sub-section (2) along two lines of argument. First, he said that to exercise our power therein contained for the purpose under discussion was contrary to the statutory provisions; secondly, he said that we were bound in this matter by a recent decision of our own and by an earlier decision of the West African Court of Appeal. It is now necessary to examine both these arguments in some detail. In developing his first line of argument he said that sub-section (2) had no relevance to the case before us because it was inserted to meet cases where a native court has dealt with a matter correctly in accordance with native law or custom but where the matter should have been dealt with under some Ordinance. But the language of the section is clear and unambiguous, and I hesitate to draw attention to the passage on page 2 of Maxwell's Interpretation of Statutes (10th Edition) because the principle contained in it is too well known. It is—

"If the words of the statute are in themselves precise and unambiguous no more is necessary than to expound those words

in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature."

I am unable to find anything in sub-section (2) which limits its operation in the manner suggested. Moreover it is important to observe that this sub-section first made its appearance in the 1948 Ordinance when express legislative provision was first made to empower native courts to try offences under native law or custom, notwithstanding anything contained in the Criminal Code. I make the point that, by re-enacting sub-section (2), the Legislature of the Northern Region has maintained the safeguard which the Legislature has insisted upon maintaining since 1948.

Next he said that it was the duty of this court to uphold the decision of the native court in the case of a conviction for intentional homicide if the decision was correct in Maliki law. As to that, I can only point out that the sub-section says the contrary.

It was then said that the Criminal Code does not apply to everybody in Nigeria, and that a native court has no option but to apply native law and custom. I cannot accept either proposition. It seems to me that the Criminal Code applies throughout Nigeria and to everybody in it. And when the Legislature was called upon to meet the situation which has been brought to their notice by the *Tsofo Gubba* case they refrained from restoring the words to section 4 of the Criminal Code Ordinance which would have excluded native courts from the application of that section. Instead, they gave dispensation to the native courts from what otherwise would have been their obligation to try offences under the Criminal Code; and, by section 10A of the Native Courts Ordinance they permitted them to try offences against native law and custom in accordance with their own native law. Section 10A is permissive. It does not preclude a native court from trying an offence under the Criminal Code if it so wishes. And by sub-section (2) of section 3 of the 1948 Ordinance they were given express power to do so. This express power was not repeated in section 10A in 1951 because owing to the permissive wording of section 10A (formerly section 3 (1) of the 1948 Ordinance), the express power given in section 3 (2) was unnecessary. Therefore, in the view which I take of this matter, it is not correct to say that the Criminal Code does not apply to native courts. It does apply to them. But by virtue of section 10A of the Native Courts Ordinance they are relieved from the duty of applying it in trying offences against native law or custom and are allowed to try such offences in accordance with their own law. I have already made the point (which I regard as important) that sub-section (2) first came on the Statute book in 1948 in the same Ordinance that relieved native courts of the obligation to apply the Criminal Code. The sub-section expressly says that this power may be exercised "notwithstanding that the decision of the court of first instance was

Fagoji v. Kano N.A. Brown C. J.

correct by native law and custom." If this power is not to be used in a case where a native court has sentenced a man to death for homicide —correctly by native law and custom—but where the record suggests that by the Criminal Code the offence might be manslaughter and not murder if the evidence was elucidated from that aspect, then in what circumstances is it to be used? The Attorney-General said that it was to be used when a native court has dealt with a matter correctly in accordance with native law and custom when it ought to have dealt with it under some Ordinance. I have already commented upon that. And I would now add that, for the purpose to which he referred, sub-section (2) is not needed, because such a case is provided for by the last nine words of section 62 of the High Court Law and by section 10 (1) (*a*) of the Native Courts Ordinance and by section 20 (1) (*c*) of the Native Courts Law (which latter provision is not yet in force).

But sub-section (2) is not the only provision which gives us the power to exercise our powers contained in sub-section (1) for this purpose, although nowhere is it more explicitly stated than in sub-section (2) by the words "notwithstanding that the decision of the court of first instance was correct by native law and custom". By section 62 of the High Court Law, in appeals from a native court "no objection to any proceeding in such court shall be taken or allowed on the hearing of an appeal from a decision of such court . . . if such proceeding or decision is not in fact . . . incompatible with the provisions of any written law." How can it be said that to sentence a man to death for an offence of which the facts disclosed would, by the Criminal Code, require a conviction and sentence for manslaughter, is not incompatible with the written law contained in the Criminal Code?

The Attorney-General then said that the power contained in sub-section (2) is permissive. And he asked why we should confine its exercise to cases of homicide and why we should not extend its exercise to cases of theft, drunkenness, and other offences under native law and custom. The answer is that we do not need it. In the case of a sentence for theft the safeguard is provided by the proviso to section 10A of the Native Courts Ordinance (section 22 of our Native Courts Law); and if the conviction was obtained by such a lack of evidence as is contrary to "natural justice, equity and good conscience" the remedy is provided by section 62 of the High Court Law. More pertinent is the case where the prescribed "hadd" punishment of eighty lashes for "shrub" (drunkenness) is imposed. If we had reason to believe that such a sentence would be inflicted in a manner which would contravene the requirements of sub-section (2) of section 20 of the Native Courts Law (section 10 (2) of the Native Courts Ordinance) regarding "humanity", again the power contained in sub-section (2) of section 67 of the Native Courts Law would not be

necessary. Section 20 (2) of the Native Courts Law, coupled with section 62 of the High Court Law ("if such decision is not in fact . . . incompatible with the provisions of any written law" viz. section 20 (2) of the Native Courts Law) would give us the necessary power to intervene.

My concluding observation upon the Attorney-General's first line of argument is that since sub-section (2) explicitly empowers us to intervene in a case where the decision of the native court was correct by native law and custom there must be some yard-stick by which we are to exercise that power. What yard-stick can this be other than the Criminal Code, which applies throughout Nigeria—and by section 4 of the Criminal Code Ordinance no person is to be punished in any court in Nigeria except in accordance with the express provisions of the Code—subject to the dispensation which is accorded to native courts by the Native Courts Ordinance (and by our Native Courts Law) that they may try offences against native law and custom according to their own law. But that dispensation does not apply to this Court. And it seems to me that this view is confirmed by section 62 of the High Court Law, which also, by implication, gives us the power to intervene where a decision of a native court is "incompatible with the provisions of any written law", that is to say, in the matter which I am considering, the Criminal Code.

I now come to the Attorney-General's second line of argument: that we are bound in this matter by judicial decision. He said that we are bound by the decision of this Court in the case of *Jalo Tsamiya v Bauchi N.A.* (unreported) which was an appeal from a conviction for homicide in a native court, in which the judgment of the court was delivered by Bairamian, J., in Kaduna on the 28th of May; and that we are also bound by the decision of the West African Court of Appeal in *Gishiwa Gana v Bornu N.A.* (14 W.A.C.A. 587).

In the case of *Jalo Tsamiya*, the relevant passage from the judgment reads as follows:—

> "It seems to us impossible to say that we can, under paragraph (*iv*) (of sub-section (1) of section 40A of the Native Courts Ordinance), substitute a decision of manslaughter in the present case: it is not a decision which the trial court could have made."

I pause there to say that with that proposition I respectfully agree. The learned Judge then goes on—

> "Incidentally, our view maintains harmony between section 10A and section 40A, both of which were introduced by Ordinance No. 2 of 1951 into the Native Courts Ordinance."

I would here point out that while it is true to say that they were introduced into the Native Courts Ordinance by the 1951 Ordinance they had made their first appearance in the 1948 Ordinance, by sections

Fagoji v. Kano N.A. Brown C. J.

3 and 4 of that Ordinance respectively. The learned Judge then goes on—

> "The Legislature could not have intended in Ordinance No. 2 of 1951 on the one hand to say under section 10A that a native court should try an offence in accordance with native law and custom, and on the other hand to say under section 40A, paragraph (*iv*), that an appeal court should upset its decision though rightly decided under customary law."

It has been stated by Bairamian, J., from the Bench in the present case that in the *Jalo Tsamiya* case he overlooked the provisions of sub-section (2).

In *Gishiwa Gana's* case the following passage appears at the end of the learned President's judgment—

> "Although the point was not argued at the hearing before us, counsel filed additional grounds of appeal in which he referred to section 5 of Ordinance No. 36 of 1948, paragraph (*c*) of sub-section (2) of which enabled the Supreme Court if satisfied that, by reason of the application to the case of native law or custom, the decision of the trial Court was unsatisfactory having regard to the provisions of the Criminal Code, to substitute a conviction for manslaughter for one of murder."

Pausing there, I would point out that the additional ground of appeal to which the learned President is referring, and which was not argued, was plainly misconceived because section 5 of Ordinance No. 36 of 1948 did not deal with the powers of the Supreme Court sitting in its appellate jurisdiction, but to the powers of a single Judge of the Supreme Court in the exercise of his duty to review. The learned President then goes on—

> "We need do no more than point out that the whole of Ordinance No. 36 of 1948 was repealed by section 5 of the Native Courts (Amendment) Ordinance, 1951."

It is to this last-quoted passage that we have all given the most careful and anxious consideration. As in the case of Bairamian, J. in *Jalo Tsamiya's* case, so in the case of the West African Court of Appeal in *Gishiwa Gana's* case it is manifest that the Court did not have its attention drawn to the provisions of sub-section (2) of section 40A of the Native Courts Ordinance. The learned President says that the whole of the 1948 Ordinance was repealed. True, but section 4 of the 1948 Ordinance (which gave the appellate court its powers) was re-enacted, and in particular sub-section (2) was re-enacted and is the law to this day Therefore, although the additional ground of appeal referred to a section of the 1948 Ordinance which is no longer law, the point contained in that additional ground, namely that the decision of the trial Court was unsatisfactory having regard to the provisions of the

Criminal Code regarding manslaughter, could have been considered by the Court if their attention had been drawn to sub-section (2) of section 40A. As in the judgment of Bairamian, J., so in the case of *Gishiwa Gana* it appears to be clear beyond dispute that the decision was given *per incuriam.*

I now have to address myself to the question of what is the position of this Court in the face of these decisions, given *per incuriam*, (*a*) of this Court, (*b*) of a superior Court. With regard to the decision of Bairamian, J., I do not think there is any difficulty. I think the matter is covered by a passage from the judgment of the Master of the Rolls in *Young v Bristol Aeroplane Company Limited* (1944 1 KB 718), where at page 728 he said—

> "It remains to consider the quite recent case of *Lancaster Motor Company* (*London*) *v Bremith, Limited* in which a court consisting of the present Master of the Rolls, Clauson L. J. and Goddard L. J., declined to follow an earlier decision of a court consisting of Slesser L. J. and Romer L. J. This was clearly a case where the earlier decision was given *per incuriam.* It depended on the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given *per incuriam.*"

That, I think, shows that we are not bound to follow the decision of *this* Court in *Jalo Tsamiya's* case.

But in regard to the West African Court of Appeal decision in *Gishiwa Gana's* case I have been unable to find any authority in which a lower court has declined to follow the decision of a higher court given *per incuriam.* As I understood the Attorney-General, I was under the impression that he cited *Gibson v South American Stores* (*Gath and Chaves*) *Limited* (1950 CL 177) in support of his contention that we are bound to follow the *Gishiwa Gana* decision because the West African Court of Appeal is a superior court. But in that case, too, it would appear that the Court of Appeal was being invited to

Fagoji v. Kano N.A. Brown C. J.

depart from an earlier decision of its own, though differently constituted. And if it had been a case in which a lower court was being asked to decline to follow a decision of a higher court I do not think it would support the Attorney-General's contention. At page 169 the Master of the Rolls said—

> "Faced with that decision, Mr Milner Holland was obviously in a very considerable difficulty. Reference was made to the recent decision of the full Court of Appeal in *Young v Bristol Aeroplane Company Limited* which has laid down that this court is bound by the decisions of the Court of Appeal save in certain precise and fairly well defined exceptions. Only one exception could be invoked by Mr Milner Holland, and that was that *In re-Laidlaw* the decision must be taken to have been given *per incuriam*. In the first place, I think myself that it would be for Mr Milner Holland to show that (if it was so) the decision was given *per incuriam*; in other words, the onus would be upon him. *Prima facie* one must, I think, assume that in a case in which the point is directly raised, the judges of this court will have considered it, more particularly where they reverse the decision of the court below."

But it seems to me that the present case is very different. Here the presumption that subsection (2) was considered in the *Gishiwa Gana* case is rebutted in the learned President's own judgment. He says that "the point was not argued". And the passage "We need do no more than point out that the whole of Ordinance No. 36 of 1948 was repealed" seems to show beyond controversy that he overlooked the fact that the whole of section 4 was re-enacted.

Therefore it seems to me that we are faced with this simple alternative: either we must disregard the provisions of a statute and follow two decisions which are shown to have been given *per incuriam*; or we must pay regard to the statute and ignore the decisions. I use the word "disregard" advisedly. I desire to make it very clear that we are not being asked to construe subsection (2) in a manner of which we do not approve because we are bound by judicial decision to construe it in that way. Subsection (2) was never construed by the Courts which gave these two decisions; it was never brought to the Courts' attention; it was never argued; it was in fact overlooked. In those circumstances I cannot think that the law requires that we should similarly overlook it.

But the matter does not end there. Since the *Gishiwa Gana* case there has been the decision of the Federal Supreme Court in the case of *Idi Wonaka v Sokoto N.A.* (1956 N.R.L.R. 19). That case came before this Court at Kano on appeal; and the question of provocation was raised. As in the two decisions which I have been discussing, our attention was not drawn to subsection (2); and we also overlooked it. Hence we dealt with the matter solely from the aspect of Maliki

law; and the provisions of the Criminal Code regarding manslaughter were not considered by us. But on appeal from us to the Federal Supreme Court the principles of English law regarding provocation were considered. Jibowu, J., (who delivered the judgment of the Court), having held (as we had held) that the conviction of the appellant was in accordance with Moslem law, proceeded to consider the evidence of provocation in the light of the English decisions. Neither sub-section (2) of section 40A of the Native Courts Ordinance nor the Criminal Code are specifically referred to in his judgment. But I think it fair to say that, by implication, the Court considered the question of whether the power which is contained in subesction (2) should not be exercised according to the provisions of the Criminal Code—even though the subsection itself does not appear to have been brought to their attention, and even though it may yet again have been overlooked (as this Court had overlooked it in the Court below). The point to which I wish to draw attention is that, having satisfied itself that the conviction was in accordance with the provisions of Moslem law, the Federal Supreme Court did not leave the matter there but went on to consider whether the evidence of provocation would reduce the crime to manslaughter. In so doing, they considered whether, in the light of the evidence in that case, they should exercise the power with which the Legislature has provided appellate courts since 1948.

My answer to the first question which was formulated by this Court at Kano is that in considering the exercise of the power contained in sub-section (2) we must have regard to the provisions of the Criminal Code.

(The learned Chief Justice then considered the law of manslaughter contained in the Criminal Code; and after dealing with the facts of the case, came to the conclusion that there was no evidence of provocation which would reduce the offence to one of manslaughter under the Criminal Code.)

Bairamian S. P. J.' The appellant was found guilty of intentional homicide and sentenced to death by a Native Court applying Maliki law as its native law and custom, correctly, for in that law intentional homicide includes murder and manslaughter and provocation is not accepted as a mitigating circumstance.

The argument for the appellant is that he killed under provocation; it raises to begin with this question:—

(1) whether the Criminal Code applies in the hearing of the appeal. This I shall discuss briefly in view of the judgment of the learned Chief Justice, with which I am in agreement.

Sections 2 and 4 of the Criminal Code Ordinance make the Criminal Code the law throughout the country and apply it to all criminal

Fagoji v. Kano N.A. Bairamian S. P. J.

cases to which it may be relevant. Nevertheless section 10A of the Native Courts Ordinance provides that—

> "Subject to the provisions of this Ordinance, but notwithstanding anything contained in the Criminal Code Ordinance, where any person is charged with an offence against native law or custom, a native court may try the case in accordance with native law or custom even though the act or omission constituting the offence may also constitute an offence under the provisions of the Criminal Code or of any other enactment."

(There follows a proviso which I think is not relevant here.) Pursuant to that provision a native court is at liberty to try a case in accordance with native law and custom; it must, however, be also noted that that provision is "subject to the provisions of this Ordinance", which until recently brought in section 40A of that Ordinance but now brings in section 67 of the Native Courts Law of the Northern Region as the enactment governing appeals before the High Court in criminal matters tried in native courts. This section 67 confers certain powers on the High Court in sub-section (1) and goes on to provide in sub-section (2) that—

> "Any powers conferred by sub-section (1) of this section may be exercised notwithstanding that the decision of the court of first instance was correct by native law and custom."

It has been argued for the respondent that sub-section (2) is limited to a particular class of case; but the wording covers the entire field of sub-section (1), which speaks of the court's "appellate jurisdiction in criminal matters" without limitation and pertains to all appeals in criminal matters from the native courts.

One of the powers conferred is, in (1) (*b*) (*ii*), to—

> "order the retrial of the appellant before a court of competent jurisdiction on the same charge or accusation or on any charge or accusation which might have been laid on the facts as disclosed by the evidence",

and this power may be exercised by the High Court in this appeal on the following condition, as stated in (*b*)—

> "if such court considers that there is sufficient ground for interfering with the decision appealed against",

even though that decision is correct by native law or custom.

A Judge of the High Court sitting at first instance is a court of competent jurisdiction to try a case of homicide, and this appeal court has power to order a retrial before a Judge and thereby have the present case tried in the light of the Criminal Code; and a sufficient reason would be that the court thought the case was *prima facie* one of manslaughter within section 318 of the Code. It may therefore be said

that section 67 (1) (*b*) (*ii*) confers on the court a power to apply the Criminal Code. The reason for conferring that power lies in the fact that sections 2 and 4 of the Criminal Code Ordinance make the Code apply to all cases. This fact is also recognised in section 62 of the High Court Law of the Northern Region, which precludes objections derived from English law—

> "if such proceeding or decision is not in fact contrary to natural justice, morality, equity or good conscience nor incompatible with the provisions of any written law",

which by definition in section 3 of the Interpretation Ordinance includes the Criminal Code.

These provisions stem from the *Tsofo Gubba* case, which impelled the Legislature, whilst maintaining the application of the Criminal Code to all cases, to allow native courts to try cases in accordance with their customary law on the one hand, and on the other to have their decisions corrected in the light of the Criminal Code where necessary in courts familiar with its provisions. That the cases mainly in mind were those of homicide is evident from the provisions of the Native Courts Ordinance, 1948, from which the learned Chief Justice has traced the history onwards to Ordinance No. 2 of 1951 and the new Native Courts Law. Sub-section (2) of section 67 of the new Law is the child of sub-section (2) of section 40A inserted by Ordinance No. 2 of 1951 into the old Native Courts Ordinance, and section 40A (2) was taken from section 4 (2) of the Native Courts Ordinance, 1948; the intention with which it was first enacted remains the same every time it is repeated.

There is in the notes of the argument a submission by the learned Attorney-General that "sub-section (2) can only be exercised in a case where this Court makes an order which the Court below could have made". That with respect is where sub-section (2) is not needed. The submission is really an effort to limit sub-section (2) to the power in sub-section (1) (*b*) (*iii*); but sub-section (2) speaks of "any powers conferred by sub-section (1)" and applies to all the powers in (*b*), though its relevance is particularly to those in (*b*) (*i*), (*ii*), and (*iv*).

I am sorry I overlooked sub-section (2) in *Jalo Tsamiya*; it was also not drawn to the notice of the Court in *Gana v Bornu N.A.* (14 W.A.C.A., 587). The submission that they decide that the Criminal Code does not apply involves the proposition that if counsel do not cite a provision and the court overlooks it, the court is precluded from looking at it in another case however relevant and vital it may be: in other words the omission and the oversight delete a provision from the statute book. That of course is impossible; and the conclusion cannot be avoided that the Criminal Code applies in the hearing of the appeal. I pass to the next question.

Fagoji
v
Kano N.A.
Smith .J

(The learned Senior Puisne Judge then considered the law of manslaughter contained in the Criminal Code; and after dealing with the facts of the case, came to the conclusion that there was no evidence of provocation which would reduce the offence to one of manslaughter under the Criminal Code.)

Smith J.: I have had the opportunity of reading the judgment of the learned Chief Justice in this appeal and am entirely in agreement with his conclusion "that in considering the exercise of the power contained in sub-section (2) (of section 67 of the Northern Region Native Courts Law) we must have regard to the provisions of the Criminal Code." I have nothing to add to the very clear and detailed reasons for this conclusion which are set out in his Lordship's judgment.

(The learned Judge then considered the law of manslaughter contained in the Criminal Code; and after dealing with the facts of the case, came to the conclusion that there was no evidence of provocation which would reduce the offence to one of manslaughter under the Criminal Code).

Appeal dismissed.

JALO TSAMIYA *v* BAUCHI NATIVE AUTHORITY

[Federal Supreme Court (Jibowu Ag. F. C. J., De Lestang F. J., Hubbard Ag. F. J.) October 26, 1956]

[Criminal Appeal No. F.S.C. 84/1956]

Conviction of homicide under Moslem law—Sentence of death—powers of the High Court under section 67 *Native Courts Law*, 1956, *where evidence upon the record suggests manslaughter under the Criminal Code—section* 4 *Criminal Code Ordinance, Cap.* 42—*Section* 10*A Native Courts Ordinance, Cap.* 142—*section* 67(2) *Native Courts Law*, 1956.

The appellant was convicted of intentional homicide ('amd) in the court of the Emir of Bauchi and sentenced to death. The facts were that he stabbed one Buba in the right shoulder with a knife. The knife penetrated the lung and the wound proved fatal. The appellant admitted the charge with the words "I killed Buba with a knife. I stabbed him in the back with it". The appellant alleged that the incident arose from a quarrel about money. He said that the deceased had seized hold of his trousers and his testicles; and that he, the appellant, then drew his knife and stabbed the deceased.

Upon the hearing of the appeal, it was contended on behalf of the appellant, *inter alia*, that the offence which he committed was the offence of manslaughter under the Criminal Code, and that the High Court of the Northern Region sitting in its appellate jurisdiction ought to have exercised its powers under section 67 of the Native Courts Law, 1956.

Held: disapproving the views expressed in *Ayuba Dan Rufai Fagoji v Kano N.A.*:

(1) a Native Court in the Northern Region is not empowered to apply the sections of the Criminal Code relating to homicide;

(2) the High Court is not empowered to substitute a verdict of manslaughter if the evidence disclosed in the Court below discloses the offence of manslaughter under the Criminal Code;

(3) the High Court has no power to order a retrial under the Criminal Code in homicide cases if the conviction and sentence are correct according to Maliki law;

(4) the question whether the offence is manslaughter in "English law" cannot be inquired into;

(5) the only questions that can be raised are whether the decision of the court below is correct by native law and custom and

whether it is contrary to natural justice, morality, equity or good conscience or incompatible with the provisions of any written law.

Cases referred to:

Idi Wonaka v Sokoto Native Authority, 1956 N.R.L.R. 15 referred to:

Idi Wonaka v Sokoto Native Authority, 1956 N.R.L.R. 19 (F.S.C.) explained;

Ayuba Dan Rufai Fagoji v Kano Native Authority disapproved;

Dilworth v Commissioner of Stamps (1899) A.C. 99 applied;

Jalo Tsamiya v Bauchi Native Authority, unreported decision of the High Court of the Northern Region in 1956, affirmed;

Gishiwa Gana v Bornu Native Authority, 14,W.A.C.A. 587 approved.

CRIMINAL APPEAL

Fani Kayode for the appellant.

H. H. Marshall, Q.C., Attorney-General, Northern Region, and *Nasir, Crown Counsel*, for the respondent.

Jibowu, Acting Chief Justice of the Federation, delivering the judgment of the Court, stated the facts; and after considering the further grounds of appeal, continued:—

Counsel for the appellant then dealt with the first ground of appeal, which reads:

> "The decision of the High Court was erroneous in law as the the learned Judges on appeal failed to direct their minds to the provisions of the Northern Region High Court Law, that:— 'When the jurisdiction conferred on any Native Court is, as regards law, practice and procedure, regulated in any particular by native law and custom, no objection to any proceeding in such Court shall be taken or allowed on the hearing of the appeal from a decision of such Court on the ground only that, in any such particular, there has been a failure to observe any principle of English law or any English rule of evidence or procedure, if such proceeding or decision is not in fact contrary to natural justice, morality, equity, or good conscience.' "

He referred to section 67 of the Northern Region High Court Law from which the quotation has been taken, and asked the Court to exercise its powers and order a retrial before the Magistrate's Court to ensure that the Criminal Code would be applied and to make it possible for a verdict of manslaughter to be returned instead of the verdict of murder. In making this submission the learned Counsel relied on the views expressed in *Ayuba Dan Rufai Fagoji v Kano N.A.*, a recent appeal

Taaniya v Bauchi N.A. Jibowu Ag. F. C. J.

from a conviction for murder which was heard at Kaduna by the High Court of the Northern Region consisting of the Honourable the Chief Justice, the Senior Puisne Judge and a Judge of the Northern Region. The appeal first went before Bairamian S. P. J., and Hurley J., at Kano, where Counsel for the appellant, in course of the hearing of the appeal, submitted that the offence disclosed on the evidence was manslaughter on the ground of provocation, and not murder of which the appellant was convicted, and that the Criminal Code applied to the case which was tried by the Emir of Kano's Court. M. Nasir, for the respondent, conceded that the Criminal Code applied, but the Judges of appeal were not prepared to accept the concession without further arguments. The following questions were then formulated for argument before three Judges at Kaduna:—

"(1) Whether the Criminal Code applies in hearing the appeal;

(2) On the law of manslaughter under the Criminal Code;

(3) On what should be done in this case."

The Court decided on question (1) that the Court must have regard to the provisions of the Criminal Code in exercising the powers contained in section 67 (1) (*b*) (*ii*) of the Northern Region Native Courts Law No. 6 of 1956, which reads:—

"Any Court (other than the Federal Supreme Court) exercising appellate jurisdiction in criminal matters under the provisions of this law may in the exercise of the jurisdiction—

(*b*) (*ii*) order the retrial of the appellant before a court of competent jurisdiction on the same charge or accusation, or any other charge or accusation which might have been laid on the fact as disclosed by the evidence, or . . . . . ."

We are not concerned with the answers to questions (2) and (3) in this case. It is sufficient to say that the law of provocation has been administered in this country for years back on the footing that the provocation which would reduce murder to manslaughter must be a grave one and that there is nothing new in the views expressed by the High Court on question (2). By applying this principle to the facts of the case, the High Court found that the provocation offered to Fagoji was not grave enough to justify his cracking the deceased's head with a stick he took from the deceased, and so dismissed his appeal.

In considering the question whether the Criminal Code applies to the Native Courts one has to deal with the various enactments historically, as was done by the learned Chief Justice of the North, and the history has to begin with the Criminal Code Ordinance of 1916, section 4 of which specifically excluded native tribunals from its operation. That being so, the definition of "Court" in section 1 of the Criminal Code

Tsamiya v Bauchi N.A.

Jibowu Ag. F. C. J.

to which the Code applied did not, therefore, include the native tribunals or Courts. The definition reads:

> "Court", "a Court", "the Court", includes the Supreme Court and the Chief Justice and Puisne Judges of the Supreme Court sitting together or separately, and every commissioner of the Supreme Court being engaged in any judicial act, or proceeding or inquiry, and also includes a provincial Court and any member of a Provincial Court being engaged in any judicial act or proceeding or inquiry".
>
> The word "includes" used in this definition of "Court", "a Court" or "the Court" is equivalent to "means and includes" and affords an exhaustive explanation of the meaning which must be attached to the word. *See Dilworth v Commissioner of Stamps*, 1899, A.C. 99, at pages 105 and 106.

By section 2 of the Criminal Code Amendment Ordinance, No. 56 of 1933, the words "other than a Native Tribunal" were deleted from section 4 of the Criminal Code Ordinance. Section 4 of the Criminal Code Ordinance as amended in 1933 therefore reads:—

> "No person shall be liable to be tried or punished in any Court in Nigeria for an offence except under the express provisions of the Code *or* some other Ordinance or some Order in Council made by Her Majesty for Nigeria, or under some express provisions of some statute of the Imperial Parliament which is in force in or forms part of the law of Nigeria".

The Native Courts Ordinance, No. 44 of 1933, is some other Ordinance under the provisions of which a person subject to its jurisdiction may be tried. Section 10 of the Native Courts Ordinance specifically laid down the law to be administered in Native Courts and it is (*a*) Native law and custom; (*b*) the provisions of any Ordinance which the Court may be authorised to enforce by an Order in Council under section 12, and (*c*) the provisions of all rules or orders made under the Native Authority Ordinance, or under the repealed Native Authority Ordinance and in force in the area of the jurisdiction of the Court.

By section 10 (2) of the Native Courts Ordinance a Native Court may impose for offences against any native law or custom a fine or imprisonment or both, or any punishment authorised by native law or custom, provided it does not involve mutilation or torture, and is not repugnant to natural justice and humanity. It is to be observed that section 10 of the Native Courts Ordinance makes it imperative for the Native Court to administer the laws set out in (*a*), (*b*) and (*c*) above by using the words "shall administer". The Native Court cannot, therefore, administer any law other than as set out in section 10 of the Native Courts Ordinance. Section 12 of the Native Courts Ordinance reads as follows:—

Tsamiya v Bauchi N.A. Jibowu Ag. F. C. J.

"The Governor in Council may by Order in Council confer upon all or any Native Court jurisdiction to enforce within the local limits of their jurisdiction all or any of the provisions of any Ordinance specified in such Order and to impose penalties on persons subject to the jurisdiction of the Court who offend against such provisions, subject to such restrictions and limitations, if any, as may be specified in the Order."

Pursuant to the provisions of section 12 the Governor in Council made the Native Courts (Jurisdiction in Miscellaneous Criminal Offences) Order in Council setting out various Ordinances which might be enforced by Native Courts, and such Ordinances include the Criminal Code. Page 14 of Volume IX, Laws of Nigeria, shows that in the Northern Provinces, which have since become the Northern Region of Nigeria, the sections of the Criminal Code which all Native Courts in the Northern Region are empowered to enforce are sections 249 and 250, and Grades A and B Courts may also enforce sections 222 (*a*), 222 (*b*), sub-sections (1), (3) and (4) of section 225 (*a*) and sub-section (3) of section 369 of the Criminal Code, besides sections 124, 130, 134, 135, 136, 137, 138, 139, 140, 141, 142, 144, 145, 243, 244, 245, 247, 341, 365, 372, 394, 488, 489 and sub-sections (4), (5), (6), (7), (8) and (9) of section 133 of the Criminal Code which all Native Courts in all Provinces and Colony might enforce. It is to be specially noted that these sections do not include sections dealing with homicide. These are the only sections of the Criminal Code that the Native Courts in the Northern Region are empowered to enforce.

The Criminal Code from its inception was not intended to be administered by Native Courts or Native Tribunals, hence the express exclusion of Native Tribunals in section 4 of the Criminal Code Ordinance of 1916, but the enactment of the Native Courts Ordinance No. 44 of 1933 rendered it necessary to exclude the words "other than a Native Tribunal" in section 4 of the Criminal Code Ordinance, 1916, as it was clear from the provisions of sections 10 and 12 of the Native Courts Ordinance and the Order in Council made under section 12 that Native Courts in the Northern Provinces, now Northern Region, had no jurisdiction conferred on them to enforce any section of the Criminal Code other than those specified in the Order in Council.

The object of the legislature in originally excluding Native Tribunals or Courts from the operation of the Criminal Code appears to have been maintained by the enactment of the Native Courts Ordinance, No. 44 of 1933, hence the Criminal Code (Amendment) Ordinance No. 56 of 1933, which was enacted later in the year, removed from section 4 of the Criminal Code Ordinance of 1916 the words "other than a Native Tribunal".

Tsamiya v Bauchi N.A. Jibowu Ag. F. C. J.

The position then was that the Native Courts could not administer the Criminal Code except for the few sections thereof mentioned in the Order in Council until 1948 when section 3 (2) of the Native Courts Ordinance No. 36 of 1948 expressly conferred jurisdiction to try and punish offences under the Criminal Code on Native Courts in the following terms:—

> "Subject to any limitation imposed on its jurisdiction by or under the Native Courts Ordinance, a Native Court may try and punish a person for any act or omission constituting an offence against the provisions of the Criminal Code as if jurisdiction in that behalf had been conferred upon the Court by Order in Council under the Native Courts Ordinance".

Section 3 (1) of the same Ordinance still allowed the Native Courts to apply Native law and custom "notwithstanding anything contained in the Criminal Code Ordinance" even though the act or omission constituting the offence under native law and custom may also constitute an offence under the provisions of the Criminal Code or of any other enactment.

It is true, as stated by the learned Chief Justice, that when section 3 (1) of the Native Courts Ordinance No. 36 of 1948 was repealed by the Native Courts (Amendment) Ordinance No. 2 of 1951, the section was re-enacted by Ordinance No. 2 of 1951 as section 10A of the Native Courts Ordinance. It is, however, to be noted that when the Native Courts Ordinance No. 36 of 1948 was repealed by Ordinance No. 2 of 1951, section 3 (2) of the Ordinance No. 36 of 1948 was not re-enacted in the Ordinance No. 2 of 1951, and up till today the sub-section has not been reproduced, so that the position of the Native Courts with regard to the Criminal Code became the same as it was before the enactment of Ordinance No. 36 of 1948, with the result that the Native Courts have no jurisdiction to administer any section of the Criminal Code which is not specified in the Order in Council under section 12 of the Native Courts Ordinance of 1933. As no recent enactment has been passed to confer jurisdiction on the Native Courts to administer other sections of the Criminal Code than those specified in the Order in Council referred to above and the Order in Council has not been amended to include the whole of the Criminal Code, the inescapable conclusion is that no section of the Criminal Code except those specified in the Order in Council can be applied and enforced by the Native Courts.

With respect to the learned Chief Justice and Judges of the High Court, they appear to have gone astray by holding that the withdrawal of the words "other than a Native Tribunal" from section 4 of the Criminal Code of 1916 by the amending Ordinance of 1933 *ipso facto* applied the Criminal Code to Native Courts without considering the enactment of the Native Courts Ordinance of 1933 with regard to the

law to be administered in Native Courts. If this point had been considered by their Lordships we have no doubt that they would have discovered that the Criminal Code could be applied to Native Courts only by Order in Council under section 12 of the Native Courts Ordinance. Sections 10 and 12 of the Native Courts Ordinance and the Order in Council passed under section 12 definitely show that the Legislature did not intend that Native Courts should apply the Criminal Code generally and it appears unreasonable to hold otherwise.

It is clear, therefore, that the words deleted in 1933 from section 4 of the Criminal Code of 1916 were not withdrawn with a view to applying the Code generally to Native Courts. Having started with the wrong premise, it is no wonder that the High Court arrived at a wrong conclusion that the Criminal Code applies generally to the Native Courts.

At this stage and before we consider the power of the High Court in its appellate jurisdiction in cases of homicide coming from the Native Courts, we would like to observe that section 4 of the Native Courts Ordinance of 1948 which specified the powers of the appellate Court in criminal trials was repealed by Ordinance No. 2 of 1951, but was re-enacted by section 4 of the same Ordinance as section 40A of the Native Courts Ordinance.

Section 5 of the Ordinance No. 36 of 1948 gave the Judges of the Supreme Court, now the High Court in the different Regions, power to review judgments of the Native Courts in homicide cases. This power was withdrawn by the repeal of the Native Courts Ordinance of 1948 by the Native Courts (Amendment) Ordinance No. 2 of 1951. It is to be noted that the power of review has not since been restored to the High Court. The power of review definitely empowered the Judge to substitute a verdict of manslaughter in appropriate cases. It is clear that the Legislature did not want the Supreme Court Judges to continue to have the power to substitute verdicts of manslaughter for those of murder, hence the power to do so was withdrawn. We shall consider later on whether the High Court has, by the power conferred on it as an appellate Court, the power to substitute a verdict of manslaughter for murder. On this point section 67 (1) (*b*) (*iii*) of the Northern Region Native Courts Law, No. 6 of 1956, which in effect reproduces section 40A (*b*) (*iv*) of the Native Courts (Amendment) Ordinance of 1951, becomes relevant. The section reads: "After hearing the whole case or not and whether in whole or in part substitute any other decision (whether as to guilt or punishment) which the Court of first instance could have made, but so that, by the decision as substituted, the appellant shall not be found guilty of any offence of which he was not accused before the Court of first instance, unless the appellant before the Court of first instance would not have been substantially affected if he had been so accused."

Tsamiya v Bauchi N.A. Jibowu Ag. F. C. J.

This is the sub-section under which the High Court is empowered to substitute a verdict or sentence for the one returned or passed on the appellant. It is now well known, and the High Court agreed, that the offence of manslaughter is unknown to Moslem Law or Maliki Law, so that the Native Court could not have returned a verdict of manslaughter on a charge of homicide with intent. It follows, therefore, that the High Court cannot substitute a verdict of manslaughter should the Court consider that the evidence discloses that offence according to English law or the Criminal Code. It seems to us that this provision was made advisedly and the intention of the Legislature was obviously to make it impossible for the High Court to substitute a verdict of manslaughter. This now brings us to the construction of section 67 (2) of the Northern Region Native Courts Law in relation to section 67 (1) (*b*) (*ii*) of the same law. Section 67 (2) reads:

> "Any power conferred by sub-section (1) of this section may be exercise notwithstanding that the decision of the Court of first instance was correct by native law and custom",

and section 67 (1) (*b*) (*ii*) reads:

> ". . . . . order the retrial of the appellant before a Court of competent jurisdiction on the same charge or accusation or on a charge or accusation which might have been laid on the facts as disclosed by the evidence."

The wording of the two sub-sections is clear and unambiguous so the sections must be taken in their ordinary meaning. The effect of that is that the High Court is empowered notwithstanding the fact that the decision appealed against is correct by native law and custom, to order a retrial, by a competent Court, of the appellant on the same charge or any other charge which might have been laid on the facts disclosed.

The High Court appears to have held that under these two provisions the High Court could order a retrial of a homicide case correctly decided according to native law and custom in order to achieve the object of getting a verdict of manslaughter returned by a competent Court which must be a Court able to find the verdict. That Court cannot, therefore, be another Native Court which cannot return a verdict of manslaughter nor try the appellant *de novo* under the Criminal Code.

We have already held that the Legislature did not intend the High Court to alter the verdict of murder to that of manslaughter under sub-section 67 (1) (*b*) (*iii*) of the Law; could it then have been the intention of the Legislature that the provisions of the sub-section could be circumvented by the power to order a retrial by a competent Court?

The answer to this question is, in our view, in the negative, as it must be assumed that the Legislature did not intend to create such a ridiculous position by saying, in effect, in one sub-section of the law that the High Court shall not substitute manslaughter for murder, and by saying, at the same time in another sub-section, that although the High Court shall or may not substitute manslaughter for murder, it may nullify the effect of the prohibition by ordering a retrial by a competent Court to achieve the object prohibited.

It follows, therefore, that the order for retrial under the sub-section could not have been intended to apply to homicide cases. We feel fortified in this view by the provisions of section 62 of the Northern Region High Court Law, No. 8 of 1955, which reads:

> "Where the jurisdiction conferred on any Native Court is, as regards law, practice or procedure, regulated in any particular by native law and custom, no objection to any proceeding in such Court shall be taken or allowed on the hearing of an appeal from a decision of such Court on the ground that, in any such particular, there has been a failure to observe any principle of English law or any English rule of evidence or procedure, if such proceeding or decision is not in fact contrary to natural justice, morality, equity or good conscience nor incompatible with the provisions of any written law".

Under these provisions it is clear that questions of incompatibility of native law with the English law cannot be raised on appeal, and the question whether the offence is manslaughter in English law could not be enquired into. The only questions that could be raised seem to be whether the decision is correct by native law and custom and whether it is contrary to natural justice, morality, equity or good conscience or incompatible with the provisions of any written law.

The fact that the Maliki Law of wilful or intentional homicide differs from the English law or the provisions of the Criminal Code because it does not recognise provocation as a defence will not justify the conclusion that the Maliki Law of homicide is contrary to natural justice, equity or good conscience. It is the recognised law of the area to which it applies and it has been recognised by the people to whom it is applicable as their native law and custom. It is for the people to decide whether the law is good enough for them or not and whether they desire a change.

A similar question recently agitated the minds of the English people with regard to the death penalty on conviction for murder and the law of murder generally. It cannot be said that the death penalty which the English people consider to be a fitting punishment for murder is immoral, inequitable, contrary to natural justice or good

Tsamiya v Bauchi N.A.

Jibowu Ag. F. C. J.

conscience simply because some other countries have a different view about the death penalty. With regard to the question whether the law of wilful or intentional homicide in Maliki law is incompatible with a written law, there can be no doubt that it is incompatible with the provisions of the Criminal Code, which is a written law, but the incompatibility has been removed by direct legislation by the provisions of section 10A of the Native Courts Ordinance, which empowers Native Courts to administer native law and custom "notwithstanding anything contained in the Criminal Code Ordinance".

The incompatibility with any written law referred to here can then only relate to incompatibility between native law and custom and any other Ordinance the Native Court is empowered to apply by Order in Council.

It appears that right through the history of the Native Courts, save for the brief period of 1948-51, the intention of the Legislature has been to maintain the integrity of the Native Courts which must administer native law and custom "notwithstanding anything contained in the Criminal Code Ordinance" and to follow the practice and procedure laid down by native law and custom as required by section 14 of the Native Courts Ordinance.

It, therefore, could not have been the intention of the Legislature that after Native Courts have applied native law and custom according to their practice and procedure as they are bound to do, the appellate Court should upset their decisions correctly reached in accordance with native law and custom in order to have a retrial according to the Criminal Code. The power to order a retrial of cases from the Native Courts does, in fact, exist on the Statute Book, but in view of the foregoing facts, an order for retrial is not a power to be exercised in homicide cases from the Moslem Courts in order to get a verdict of murder changed to manslaughter.

In the judgements in *Fagoji's* case we observe that the learned Chief Justice and the members of the Court considered that they had acted *per incuriam* in their previous decisions in homicide cases from Native Courts, particularly in this case of *Jalo Tsamiya*. That was not all, they refused to follow the decision of the West African Court of Appeal in *Gishiwa Gana v Bornu Native Authority*, 14 W.A.C.A. 587 because they considered that the decision was reached *per incuriam*.

We do not quarrel with the High Court's decision not to follow their own previous decisions, if they felt that the decisions had been reached *per incuriam*; but there is no precedent for their refusing to follow a previous decision of the West African Court of Appeal on the subject matter of the inquiry because they considered that that decision had been reached *per incuriam*.

With respect to the learned Chief Justice and other members of the Court, it must be pointed out that it is not for an inferior Court to say that a decision of the higher Court was reached *per incuriam*; that is a privilege of the higher Court if, after reconsidering its former decision, it is satisfied that the previous decision had been reached *per incuriam*.

When the High Court found itself in such a position that it could not follow a previous decision of a higher Court by which, according to the comity of Courts, they are bound, the proper course, it appears, was for the High Court to have reserved questions of law under section 20 of the Federal Supreme Court (Appeals) Ordinance for the consideration of the Federal Supreme Court in order to give that Court, which has taken the place of the West African Court of Appeal, the opportunity of reconsidering previous decisions in the light of the questions reserved with a view to giving a considered ruling on the question of law raised on the issues involved.

We should also make some observation on the reference made by the learned Chief Justice to the judgment of this Court in *Idi Wonaka v Sokoto Native Authority* (1956 N.R.L.R. 19) in which the judgment of the Court was delivered by Jibowu F.J. The learned Chief Justice appeared to have been under a wrong impression that reference was made to English case law on provocation with a view to reducing the verdict of murder under Maliki law to manslaughter under the Criminal Code. Such a thought never crossed the mind of the Court which had no intention of over-ruling the West African Court of Appeal in *Gishiwa Gana v Bornu Native Authority*.

Reference was made in Idi Wonaka's case to cases on provocation in English law only to show that the appellant had no ground for complaint against the Maliki law which does not recognise provocation as a defence in homicide cases, as even under the English law his position would not have been better.

After reviewing the law from 1916 to the present date, we are satisfied that the decision in *Gishiwa Gana v Bornu Native Authority* is sound and correct and that the High Court in *Fagoji's* case have reached a wrong conclusion on the effect of section 67 (2) of the Northern Region Native Courts Law.

In this present case we have found no substance in any of the grounds of appeal, and the appeal is, therefore, dismissed.

Appeal dismissed.

AYUBA DAN RUFAI FAGOJI *v* KANO NATIVE AUTHORITY

[Federal Supreme Court (Jibowu Ag. F.C.J., de Lestang F.J., and Hubbard Ag. F.J.) 23rd November, 1956]

[Criminal Appeal No. 218/1956]

The facts are as stated in the head-note, at page 57, to the judgments of the High Court of the Northern Region.

CRIMINAL APPEAL

Appellant not represented.

Kazeem, Crown Counsel, for the respondent.

Hubbard Ag. F.J. (delivering the judgment of the Court): The appellant was convicted of wilful or intentional homicide by the Emir of Kano's Grade A Court and sentenced to death on the 14th June, 1956.

He appealed against the conviction to the High Court of the Northern Region of Nigeria, which dismissed his appeal. From this dismissal he now appeals to this Court on grounds of law based on provocation.

This appeal must fail because the defence of provocation reducing murder to manslaughter does not exist in Moslem law, the law under which the appellant was tried, nor had the Court of Appeal any power either itself to substitute a finding of manslaughter for murder, or to direct a retrial before a Court administering the Criminal Code so that the appellant could be found guilty of manslaughter only. This Court has dealt at length with these matters in its judgment in *Jalo Tsamiya v The Bauchi Native Administration* where all its reasons were given in detail.

This appeal is, accordingly, dismissed.

Appeal dismissed.

SOCIETE COMMERCIALE DE L'OUEST AFRICAIN *v* THEODORE C. OBI

[High Court at Kano (Smith J.) November 22nd, 1956]

[Kano—Suit No. K/54/1956]

Debt—Appropriation of payments to special portions of the debt—In the absence of notification by the parties of an intention to appropriate a payment to a specific debt or portion of it the intention of the parties is a matter for inference having regard to all the circumstances.

On the 28th of June there was a balance due from the defendant to the plaintiffs of £2,779-1*s*-3*d* for oil products sold and delivered. On the 12th of July the writ was issued.

After the 28th of June, both before and after the writ was issued, the plaintiffs continued to supply the defendant, and from time to time the defendant made further payments totalling £1,380. No notification was given by the defendant to the plaintiffs that the payments made after the 28th of June were to be appropriated to the balance due on the 28th of June. Nor did the plaintiffs inform the defendant that they intended to appropriate these payments to the debts which accrued subsequent to that date.

Held:

The intention of the parties must be inferred from all the circumstances of the case; the defendant continued to purchase oil products after the 28th of June and the plaintiffs ensured that the payments which he made were sufficient to cover the price of the goods supplied after that date; after the writ was issued on the 12th of July the defendant must have realised that he would not receive further supplies unless he paid for them; the intention of the parties must have been that the payments made by the defendant after the 28th of June were to be applied to meet the debts accruing after that date.

Cases referred to:

Leeson v Leeson, 1936 2 K.B. 156 followed;

Stepney Corporation v Osofsky, 1936 3 A.E.R. 494 followed;

Parker v Guinness, 1910 27 T.L.R. 129 applied.

CIVIL ACTION

Egerton Shyngle for the plaintiffs.

Lewis Thomas for the defendant.

S.C.O.A. v. Obi — Smith J.

Smith J. dealt with the accounting matters which had been raised on the pleadings and in the evidence, and continued:

On 28th June the defendant was indebted to the plaintiffs in the sum of £2,779-1*s*-3*d* being the balance due to plaintiffs in respect of the oil products sold and delivered to the defendant. After this date the defendant was allowed to remain at the petrol filling station; the plaintiffs continued to supply him with oil products; and the defendant made further payments to the plaintiffs totalling approximately £1,380. The defendant said in evidence that these payments made by him were intended to be in part payment of the balance due at 28th June. The plaintiffs said they applied them to meet the debt for oil products supplied after 28th June.

Mr Thomas for the defendant submitted that the defendant intended to appropriate these payments to the debt accrued at 28th June and referred to para. 366 of Halsbury (third edition) Vol. 8 p. 214 which reads:

> "Where several distinct debts are owing by a debtor to his creditor, the debtor has the right when he makes a payment to appropriate the money to any of the debts that he pleases, and the creditor is bound if he takes the money to apply it in the manner directed by the debtor. If the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor.
>
> An appropriation by the debtor need not be made in express terms but must be communicated to the creditor or be capable of being inferred; it may be inferred where the nature of the transaction or the circumstances of the case are such as to show that there was an intention to appropriate."

Mr Shyngle for the plaintiffs submitted that the defendant had failed to communicate to the plaintiffs any intention to appropriate; that the right of appropriation then devolved upon the plaintiffs and they applied the payments made after 28th June to the debts which accrued for goods supplied to the defendant after that date. In support of his contention Counsel referred to the following passage from the judgment of Greene, L. J. in *Leeson v Leeson* (1936) 2 K.B. 156 cited by Hewart, L. C. J. in *Stepney Corporation v Osofsky* (1936) 3 A.E.R. at p. 500:

> "It is true that a debtor who owes two debts to his creditor is entitled to appropriate a payment which he makes to his creditor to one debt rather than to the other. When, however, he does not notify the creditor of his intention, and when the circumstances are such that the creditor receives the payment merely in satisfaction of the debts and the payment is not more appropriate to the payment of one debt rather than to that of the other the creditor is entitled to make the appropriation. When it is said that there

EDITORIAL NOTE

The first case which is reported in this volume is the decision of the High Court of the Northern Region in *Ayuba Dan Rufai Fagoji v Kano N.A.* This decision must now be regarded as overruled by the decision of the Federal Supreme Court in *Jalo Tsamiya v Bauchi N.A.* which is reported immediately after it.

2. These two cases deal with the following question:—

Whether the High Court of the Northern Region, in hearing an appeal from a Moslem Court against a conviction for homicide resulting in a death sentence *where the conviction and sentence are correct according to Moslem law*, is competent to exercise the powers conferred upon it by section 67 of the Native Courts Law, 1956 (which includes the power to order a retrial before a court of competent jurisdiction), if the record discloses facts which suggest the offence of manslaughter and not murder under the Criminal Code.

3. Both cases came before the High Court of the Northern Region on appeal from a native court; and thence to the Federal Supreme Court on appeal from the High Court. In *Fagoji's* case, the High Court of the Northern Region considered the history of the legislation which is relevant to this question, and held that the decision in the case of *Tsofo Gubba v Gwandu N.A.*, 12 W.A.C.A. 141, which was decided in 1947, coupled with the legislation which had been enacted since that case, required them to order a retrial before the High Court in the exercise of the power conferred upon them by section 67 (2) of the Native Courts Law, 1956. In *Jalo Tsamiya's* case, the Federal Supreme Court considered in detail the High Court's judgments in *Fagoji's* case, and disapproved of the view which the High Court had taken.

4. The short judgment of the Federal Supreme Court in *Fagoji's* case, following their detailed judgment in *Jalo Tsamiya's* case, is also included in this volume because it furnishes the short answer to the question and is the most recent authoritative decision.

5. Only those portions of the judgments in these two cases are reported which are material to the question.

need not be an express appropriation of a payment, but that the appropriation can be inferred, that does not mean that appropriation of a payment can be inferred from some undisclosed intention in the mind of the debtor. It is to be inferred from the circumstances of the case as known to both parties."

The defendant did not inform the plaintiffs that the payments made by him after 28th June were to be appropriated to the balance due on 28th June. Nor did the plaintiffs inform the defendant that they intended to apply these payments to the debts which accrued after 28th June. It was during the hearing of the evidence in this action that the parties said what their intentions had been. I have to decide what was the intention of the parties in all the circumstances of the case. What I have to consider is very lucidly explained by Lush, J. in *Parker v Guinness* (1910) 27 T.L.R. 129 in these words: "Is the true inference to be drawn from all the circustances of the case that the debtor paid the moneys generally on account, leaving the creditor to apply them as he thought fit, or is the true inference that he paid them on account of special portions of the debt for the purpose and with a view to wipe these out of the account? His undisclosed intention would not benefit him. It is what he did in fact and not what he meant to do that is to be regarded."

The circumstances in the present case are these. The plaintiffs realising that the defendant's payments had fallen considerably in arrear wrote to defendant on 28th June demanding payment of the amount then due in accordance with clause 7 of the agreement between the parties. On 12th July, they commenced this action. At the same time the plaintiffs did not wish to terminate their contract with the defendant, which they might have done under clause 17 of the agreement, because they wished to keep the petrol filling station open. They allowed the defendant to remain at the filling station. He continued to purchase oil products from the plaintiffs. He made payments to the plaintiffs after 28th June but did not expressly say that they were moneys to be applied to the debt accrued on that date. The plaintiffs, according to their manager Dessaint, ensured that these payments were sufficient to meet the price of the oil products supplied after 28th June. The inferences to be drawn from these facts are that the plaintiffs would not have sold more oil products to the defendant unless they were satisfied that the payments made by defendant after 28th June were sufficient to cover the price of these products; that by the time this action commenced on 12th July the defendant must have realised, if indeed he had not realised earlier, that he would not receive further supplies unless he paid for them; and that if he failed to do so he ran the risk of being given notice to determine the contract under clause 17 of the agreement. These are circumstances which were known to both parties; and the intention of the plaintiffs and defendant

S.C.O.A.
v.
Obi
Smith J.

could only have been that the payments made by defendant after 28th June were to be applied in satisfaction of the debts accruing after that date.

I enter judgment for plaintiffs for £2,731-2*s*-11*d* on the claim with costs assessed at 75 guineas (including disbursements) and judgment for the defendant for £809-6*s*-5*d* on the counterclaim with costs assessed at 50 guineas (including disbursements).

Judgment for the plaintiffs on the claim; judgment for the defendant on the counterclaim.

INSPECTOR GENERAL OF POLICE *v* SYDNEY MARKE

[C. A. (Sir Algernon Brown C. J., Bairamian S. P. J.)
September 25, 1956]

[Jos—Criminal Appeal No. JD/1a/1956]

Cirminal Law and Procedure—Autrefois acquit—Discharge where no case to answer—Considerations before discharge.

Criminal Procedure Ordinance, sections 181, 185, 217, 286, 299, 301, 361, 363.

1. Section 181 provides for the circumstances in which *autrefois acquit* may be pleaded.

2. Section 185 provides that—

"The dismissal of a complaint or the discharge of the accused is not an acquittal for the purposes of sections 181 to 184."

3. Section 217 states that a person who pleads not guilty is deemed to have put himself upon his trial.

4. Section 286 provides that where a case has not been made out by the evidence for the prosecution, the defendant shall be discharged.

5. Section 299 provides that when the hearing is concluded the court shall either "dismiss or convict the accused", i.e. dismiss the complaint or convict the accused.

6. Section 301 reads as follows—

"(1) Where a complaint is dismissed and such dismissal is stated to be on the merits such dismissal shall have the same effect as an acquittal.

(2) Where a complaint is dismissed and such dismissal is stated to be not on the merits or to be without prejudice such dismissal shall not have the same effect as an acquittal."

7. Sections 361 and 363 apply the provisions relating to summary procedure to trials on information, except in jury cases, and supplement them with the procedure and practice for the time being in force in England.

In a previous trial the appellant was discharged under section 286 at the close of the case for the prosecution on the ground that there was no case for him to answer; when prosecuted again for the same offence he pleaded *autrefois acquit* relying on that discharge as being in effect an acquittal, and his plea was upheld; the prosecutor appealed relying on section 185.

For the appellant it was argued that there was a distinction between a discharge under section 286, where the defendant had not been called upon, and a dismissal of the complaint under section 299 after he had been called upon, and that it was only in the latter case if the dismissal was on the merits that it had the effect of an acquittal.

Held:

(1) For the purposes of section 181 the dismissal of a complaint on the merits has, by virtue of section 301 (1), the effect of an acquittal, and section 185 must to that extent be modified in its application.

(2) A dismissal of the complaint on the merits is a dismissal based on a decision upon the facts or upon the law applicable to the facts; where the magistrate rules in a trial at the close of the prosecution that on the evidence there is no case to answer, he makes an adjudication on the facts presented in support of the complaint, and therefore the dismissal of the complaint is on the merits and the discharge of the defendant has the effect of an acquittal.

(3) An erroneous statement by the magistrate on the nature of the dismissal of a complaint does not prejudice the question whether or not it was on the merits.

Obiter:

In a trial by jury if there is no case to answer, it is the duty of the judge to direct a verdict of not guilty; and in a trial without a jury the discharge of the defendant on that ground must also have the effect of an acquittal.

Per curiam:

Having regard to the effect of discharging the defendant on the ground that no case had been made out for him to answer, prosecuting officers should be ready with all the evidence needed for their case; and magistrates should consider whether an adjournment may not be granted to enable the prosecutor to complete his case, and, where the evidence does not fit the charge, whether the charge may not be suitably amended.

Cases referred to:

Grey v Pearson, 1857, 6 H.L. Cas. 106.

Reed v Nutt, 1890, 24 Q.B.D., 669

Clement Nwali v Inspector General of Police, unreported.

Halsted v Clark, 1944, 1 A.E.R., 270.

William Barron, 10 Crim. App. Rep., 81.

Edu v Commissioner of Police, 14 W.A.C.A., 163.
R v Sunday Ijoma and others, 12 W.A.C.A., 220.
Reg. v Kano and Arisah, 20 N.L.R., 32.

[*Editorial Note:*—The appellant appealed against this decision to the Federal Supreme Court, who upheld the decision and dismissed the appeal. Their judgement is reported in this volume.]

CRIMINAL APPEAL

Bello, Crown Counsel, for the appellant.

Eso for the respondent.

Bairamian S. P. J. (delivering the judgment of the Court): This is an appeal by the prosecutor against the decision of His Worship Mr Anderson, Acting Chief Magistrate, that the respondent was not liable to be tried again for the same offence after being discharged in a former trial under section 286 of the Criminal Procedure Ordinance, that is to say on the ground that a case had not been made out against him sufficiently to require calling on him for his defence.

The grounds of appeal are—

(1) The learned Magistrate erred in law by upholding plea of *autrefois acquit* on the ground that the previous discharge of the accused/respondent under section 286 of the Criminal Procedure Ordinance amounted to an acquittal for the purposes of section 181 notwithstanding the express provisions of section 185 to the contrary.

(2) The learned Magistrate erred in law by holding that he was bound by a decision of the High Court of Justice of the Eastern Region of Nigeria."

As regards (1), section 185 provides that—

"The dismissal of a complaint or the discharge of the accused is not an acquittal for the purposes of sections 181 to 184."

Mr Bello, who appeared for the appellant, argued that the wording was clear and unequivocal and ought to be enforced, and cited in support of his argument a passage from Maxwell on The Interpretation of Statutes to that effect (9th ed., at p. 4). On the next page of that book a passage is quoted from the judgment of Lord Wensleydale in *Grey v Pearson*, 1857, 6 H.L. Cas. 106, which reads thus:—

"In construing wills and, indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther."

I. G. P. v Marke

Bairamian S. P. J.

The question therefore arises whether the language of section 185 leads to absurdity or inconsistency.

If the section applies to trials by jury, it leads to an absurdity: for after a prisoner has pleaded not guilty and been given in charge of the jury, he can only be convicted or discharged by verdict of the jury; Halsbury's Laws of England, 3rd ed., vol. 10 p. 408, para. 741; c.f. section 41 of our Jury Ordinance, cap. 97. Consequently, when at the close of the case for the prosecution there is no case to go to the jury, it is the duty of the judge to direct a verdict of not guilty: Halsbury, p. 421, para. 722. That case is clear; it is not affected by section 286 of the Criminal Procedure Ordinance, if it means what Crown Counsel suggests that it does, namely that the discharge thereunder is not an acquittal: for trials by jury are excepted in section 361 of the Ordinance, and section 363 makes it clear that the practice in England applies.

What is not clear from 361 and 363 is whether the High Court in trials without a jury is confined to Part XXXIII of the Ordinance on Summary Trial, which excludes trials on information in the High Court. It would of course be absurd to say that a verdict of acquittal must be entered when the trial is by jury but that, when it is not, the discharge when there is no case to answer is not an acquittal.

Mr Bello argued ground (1) on the basis of Part XXXIII which comprises section 277 to 301 of the Ordinance. These deal with the hearing of complaints. A complaint is determined in one of two ways: either it is dismissed and the defendant is discharged, or he is convicted. It is dismissed in the following cases:—

(*a*) if the defendant appears but the complainant does not, without good reason: section 280;

(*b*) if the complainant withdraws his complaint by leave: section 284;

(*c*) if the evidence for the prosecution is inadequate for calling on the defendant; section 286;

(*d*) if, after he is called upon, the court is not prepared to convict him: section 299.

Section 284 states that when the court permits the withdrawal of the complaint it "shall thereupon acquit the accused unless the court directs that the accused instead of being acquitted shall be discharged". It is the only section which speaks of acquittal. Section 299 provides that—

> "Upon the conclusion of the hearing the court shall either at the same or at an adjourned sitting give its decision on the case either by dismissing or convicting the accused and may make such other order as may seem just".

I. G. P. v Marke
Bairamian S. P. J.

"Dismissing or convicting the accused" is doubtless a misprint for "dismissing the complaint or convicting the accused". If one were to take section 185 literally, even where the court dismisses the complaint after calling on the defendant, section 185 seems to say that he cannot plead the dismissal as *autrefois acquit*.

Mr Bello said that section 299 must refer to section 301 and that the words "on the merits" meant on the facts of the case considered as a whole: the distinction was, he said, between a discharge under section 286 without the defendant being called upon and the discharge or dismissal of the complaint after he was called upon; and, in his submission, the Legislature intended that the discharge under section 286 should not operate as an acquittal.

Section 301 provides as follows:—

"(1) Where a complaint is dismissed and such dismissal is stated to be on the merits such dismissal shall have the same effect as an acquittal.

(2) Where a complaint is dismissed and such dismissal is stated to be not on the merits or to be without prejudice such dismissal shall not have the same effect as an acquittal".

The wording of sub-section (2) is defective as one can see from Form No. 18 in the First Schedule to the Ordinance. It is the form for an order of dismissal; after the words "This court having heard and determined the said complaint doth dismiss the same" it should be stated whether it is on its merits or without prejudice to its being brought again, according to the note in the margin. If it was on the merits that the complaint was dismissed it was an acquittal; if it was not on the merits, it was not an acquittal. It is clear therefore that there is an inconsistency between section 185 and section 301, and as section 301 is the later section in the Ordinance and is also the special section on what is and what is not an acquittal in a summary trial, section 181 must embrace what is an acquittal by virtue of section 301 (1) and section 185 must be modified to that extent, in accordance with the rule of interpretation cited from *Grey v Pearson:* in other words, section 185 means no more than this—that the dismissal of a complaint or the discharge of the accused if not on the merits is not an acquittal for the purposes of sections 181 to 184. This solves the first part of the problem.

The second part of the problem is this; when is the dismissal of a complaint on the merits? The answer is that it is on the merits where it is based on a decision upon the facts or upon the law applicable to the facts: *Reed v Nutt*, 1890, 24 Q.B.D., 669, at p. 673. That case related to the question whether the dismissal of a summons upon the prosecutor not appearing—he did not wish to go on with the case—was on the merits; it was decided that it was not. Incidentally that case shows

that it is not open to a magistrate to issue a certificate of dismissal, in the sense that the dismissal was on the merits, when in point of law it was not. Likewise in Nigeria it is not open to a magistrate to state that the dismissal is or is not on the merits according to his pleasure; it must be according to law: and if it is not, it will not prejudice the question whether it was or was not on the merits in a given case. For example, in *Reed v Nutt* the court went behind the certificate and ascertained that the dismissal of the complaint had not been on the merits; likewise in *Clement Nwali v Inspector General of Police*, in which the Magistrate stated, when discharging the defendant at the end of the case of the prosecution in the first trial, that he did so not on the merits, and from which he argued that that discharge was not a bar to the second trial, Ainley, Ag. J. (as he then was) said that the statement of the Magistrate, which was incorrect in law, did not prejudice the question whether or not the discharge was on the merits and was a bar to the second trial, and decided that it was on the merits and was available to the appellant as a plea of *autrefois acquit*. We are in agreement with the learned Judge, and the aim of this judgment is rather to repeat for the benefit of the magistrates in the Northern Region the distinction between dismissal on the merits and not on the merits for guidance.

To repeat what has been quoted from *Reed v Nutt*: a dismissal on the merits is a dismissal based on the facts or on the law applicable to the facts. The facts come to light when evidence has been heard: in other words, a dismissal on the merits means a dismissal after evidence has been heard, or, as the Chief Justice observed in the course of the argument in this appeal, where there has been a trial. In this regard it is relevant to refer to section 217 of the Criminal Procedure Ordinance, which states that when a defendant pleads not guilty, he puts himself upon his trial; and thereafter the complainant has the duty to prove all the ingredients of the offence charged. If he fails to do so, whether the defendant is or is not called upon, the defendant has been in peril, and the dismissal of the complaint or the discharge of the defendant is an acquittal: for in either case there is an adjudication. There is the authority of *Halsted v Clark*, 1944, 1 A.E.R., 270 for saying that the discharge of the defendant at the close of the case for the prosecution on the ground that the evidence is inadequate is a bar to another prosecution for the same offence; and that settles the point whether it is a dismissal of the complaint on the merits; and there is the authority of *William Barron*, 10 Cr. App. R., 81, for saying that the fundamental point is whether the defendant was in peril.

The strongest point that could be urged in favour of the view that a discharge under section 286 is not an acquittal is that in section 234 the word "discharged" is used in contrast with the word "acquitted".

That, however, does not affect the later section 301 and the question of when the dismissal of a complaint is or is not on the merits; as already explained, the complaint is dismissed when the defendant is discharged under section 286 and that dismissal is on the merits. Here we do not propose to go into the question of when, upon leave being given to withdraw a complaint, the defendant should be acquitted; it is outside the necessities of this case.

We were given to understand that this appeal was brought for the sake of considering amendment of the Ordinance. It would seem that the unqualified wording of section 185 has been misleading. The section appears to be superfluous. We suggest that all the sections from 181 to 185 be reconsidered. Section 181 is due to come up for argument in another case; mention of it was made in *Edu v Commissioner of Police*, 14 W.A.C.A., 163; no more will be said here.

We make this order with some regret, for we see from the record of the appeal that the magistrate who took the first trial of the respondent refused to allow an adjournment for the production of a further prosecution witness and the prosecution was obliged to close, with the result, as his note put it, that "no *prima facie* case has been made out owing to my discontinuance of proceedings, and I rule that a discharge is the appropriate order", namely under section 286. Like others, the learned Magistrate may have thought that the discharge did not prevent another prosecution for the theft of money belonging to Government by one of its servants, which was the charge in question. We hope that he, and other magistrates too, will see this judgment and realise the position created by a discharge under section 286 of the Ordinance. We do not mean by these remarks to blame the magistrate in question; he may have given the prosecution one or more adjournments already and felt that a further adjournment was not deserved and would be oppressive on the defendant. We are equally anxious to impress on prosecuting officers that they have a duty to be ready with all the evidence needed to prove all the ingredients of the offence charge; we have noticed that they do not realise that need adequately in some cases which have come up on appeal. At the same time we should like to impress on magistrates the consequences of a discharge—namely that it is an acquittal—and the need to consider carefully whether an adjournment may not be granted to enable the prosecution to complete their case, with bail, in a suitable case, by way of offset for the adjournment.

The other suggestion we venture to make is that where the evidence does not quite fit the charge preferred, the possibility of amending the charge before calling on the defendant, instead of discharging him, should be considered. There is power to amend under section 163 of the Ordinance, which is explained in *R v Sunday Ijoma and others*, 12 W.A.C.A., 220, 1947; see also *Reg. v Kano and Arisah*, 20 N.L.R., 32.

I. G. P.
v.
Marke

Bairamian
S. P. J.

Patience is always necessary for the due administration of justice, and the above suggestions are made for its sake.

Appeal dismissed.

INSPECTOR GENERAL OF POLICE *v* SYDNEY MARKE

[Federal Supreme Court (Foster Sutton F. C. J., de Lestang F. J. and Hubbard Ag. F. J.), February 4, 1957]

[Criminal Appeal F.S.C. 380/1956]

Criminal Law and procedure—Autrefois acquit—Discharge of defendant at close of prosecution where no case to answer: whether an acquittal—Criminal Procedure Ordinance, sections 75, 181, 185, 286, 301.

This was an appeal from the judgment of the High Court (reported ante) that where a defendant is discharged under section 286 of the Criminal Procedure Ordinance at the close of the prosecution case on the ground that the evidence for the prosecution has not established a case for him to answer, the dismissal of the complaint is a dismissal on the merits within the meaning of section 301 (1) of the Ordinance; and that the discharge of the defendant has the effect of an acquittal for the purpose of pleading *autrefois acquit* under section 181 in a later prosecution for the same offence; and that section 185 which states otherwise must be modified, in view of section 301 (1), so as to apply only to a case where the dismissal of the complaint is not on merits.

In this further appeal by the prosecution the Crown again relied on the wording of section 185.

Held:

(1) In view of section 301 (1) the dismissal of a complaint on the merits has the effect of an acquittal, and the operation of section 185 is confined to a dismissal which is not on the merits; thus the question is whether a discharge at the close of the prosecution was or was not on the merits.

(2) The grave objection to the argument for the appellant is that the prosecution, according to that argument, have a second, third, fourth and fifth chance, and so on *ad infinitum* for prosecuting a defendant for the same offence.

(3) When an accused person is discharged at the close of the prosecution case on the ground that the evidence has not established a case for him to answer, that is a dismissal of the complaint on the merits.

Cases referred to:

Clement Nwali v Inspector General of Police (Enugu Judicial Division, E/14A/1955), unreported, approved.

I. G. P. v Marke

De Lestang F. J.

Inspector General of Police v Akinyede and another (W.A.C.A. 119/1955), unreported, distinguished.

CRIMINAL APPEAL FROM HIGH COURT OF THE NORTHERN REGION

C. O. Madarikan, Crown Counsel (with him *Okunribido*) for the appellant.

Kayode Eso for the respondent.

De Lestang F. J. (delivering the judgment of the Court); This is a second appeal by the prosecutor against a decision of a Magistrate upholding a plea of *autrefois acquit* made by the accused at his trial. The matter arose in this way. The accused was tried in a Magistrate's Court for the offence of stealing. After most of the evidence had been led, the prosecution applied for an adjournment in order to call a further witness. The application was refused, whereupon the prosecution closed its case. The Magistrate then ruled that a *prima facie* case had not been made out against the accused sufficiently to require him to make a defence. He accordingly discharged him under Section 286 of the Criminal Procedure Ordinance. Subsequently the accused was again charged before another Magistrate with the same offence. He pleaded *autrefois acquit* and his plea was upheld. In so deciding the Magistrate followed the decision in *Clement Nwali v Inspector General of Police* (Appeal No. E/14A/1955, Enugu Judicial Division), an unreported case in which Ainley J. (as he then was) held that a discharge under section 286, Criminal Procedure Ordinance, after prosectuion evidence has been tendered, had the effect of an acquittal upon which the plea of *autrefois acquit* can be properly founded. Being dissatisfied with the Magistrate's decision, the prosecutor appealed to the High Court of the Northern Region, which upheld the decision. The prosecutor then appealed further to this Court.

The short point for decision is whether the discharge of an accused person under section 286, Criminal Procedure Ordinance, is an acquittal for the purpose of the plea of *autrefois acquit*. The decision on this point requires the examination of a few sections of the Criminal Procedure Ordinance, but before doing so, it is convenient to deal first with Crown Counsel's submission that this matter is concluded by authority. He relied in support of his submission on the decision of this Court in *Inspector General of Police v Akinyede and another*, W.A.C.A. 119/1955, as yet unreported, in which the following passage occurs in the judgment of the Court:—

> "But if it appears to the Court, of its own motion or on a no case submission at the close of the case in support of the charge, that no case is made out sufficiently to call upon the accused to make a defence, the Court shall under Sec. 286 discharge him as to the particular charge before the Court. The legislature did not

intend that in such case the discharge should be an absolution of the party charged so that a plea of *autrefois acquit* should be available to him."

One of the points for decision in that case was whether in discharging an accused person under section 286, Criminal Procedure Ordinance, the Magistrate was right to find the accused "not guilty" and to "acquit" him in these terms. The Court held that he was not, but in our view the passage referred to was not strictly necessary for the decision of that point and was consequently *obiter*.

We will now proceed to examine the relevant sections of the Criminal Procedure Ordinance. The first section requiring consideration is section 181. In so far as it is material in this appeal, this section provides that a person who has once been tried by a Court of competent jurisdiction for an offence and acquitted, shall not, while such acquittal remains in force, be liable to be tried again for the same offence. This is really an explanation of what the plea of *autrefois acquit* is. Next comes section 286, which provides that if at the close of the evidence in support of the charges it appears to the Court that a case is not made out against the defendant sufficiently to require him to make a defence, the Court shall, as to that particular charge, discharge him. Finally, section 185 reads:—

"The dismissal of a complaint or the discharge of the accused is not an acquittal for the purposes of sections 181 to 184."

The prosecutor bases his contention that a discharge under section 286 is not an acquittal within the meaning of section 181 on the strictly literal construction of those three sections. Shortly put, his argument is this. An accused is not acquitted under section 286, but discharged. Section 185 expresssly says that the discharge of an accused is not an acquittal for the purpose of section 181. Therefore, a discharge under section 286 is not an acquittal for the purpose of section 181. If you are going to interpret the word "discharge" in section 286 as meaning an acquittal, you are violating section 185. This is an argument which, though attractive by its apparent logic and simplicity, disregards other material provisions of the Ordinance. One such provision which, in our view, holds the key to the decision of the question before us is contained in section 301. This section reads as follows:—

"(1) Where a complaint is dismissed and such dismissal is stated to be on the merits such dismissal shall have the same effect as an acquittal.

(2) Where a complaint is dismissed and such dismissal is stated to be not on the merits or to be without prejudice such dismissal shall not have the same effect as an acquittal,"

I. G. P. v Marke

De Lestang F. J

Section 301 clearly qualifies section 185. It shows moreover that section 185 must not be taken too literally because it is not every dismissal of a complaint (as section 185 would have it) which is not an acquittal for the purpose of section 181, but only such dismissals as are stated to be not on the merits or to be without prejudice. Where a dismissal is stated to be on the merits, it is to all intents and purposes an acquittal. This is the effect of section 301. It is pertinent, therefore, to enquire what is the fate of a complaint when the accused is discharged under section 286; does it keep its full force and effect; is it withdrawn; is it struck out or what? The section is silent on this point, but in our view it must be taken to be dismissed because clearly it is no longer operative and it has neither been struck out nor withdrawn. If we are right in this view, then the problem solves itself. The court has only to decide whether the discharge of the accused was on the merits or not. If it was then the accused can plead *autrefois acquit*, and if not, he cannot. This interpretation has, in our view, the double merit of according with the spirit of the Ordinance which broadly speaking incorporates the principles of English law, a fundamental principle of which being that no person ought to be in jeopardy more than once in respect of the same charge, and also of avoiding the grave objection which Ainley J. stressed in *Clement Nwali v Inspector General of Police*, namely, that if the Crown fail to prove a man guilty and the Magistrate does his duty and refuses to call the accused for his defence, then the Crown have a 2nd, 3rd, 4th and 5th chance, chances *ad infinitum*.

We also find support for our construction in section 75 of the Ordinance, which reads as follows:—

> "(1) In any trial or inquiry before a magistrate's court any prosecutor with the consent of the court, may, or on the instruction of the Attorney-General shall, at any time before judgment is pronounced or an order of committal is made, withdraw from the prosecution of any person either generally or in respect of one or more of the offences with which such person is charged and upon such withdrawal—
>
> (*a*) if it is made in the course of any inquiry the accused person shall be discharged in respect of such offence; or
>
> (*b*) if it is made in the course of a trial—
>
> (*i*) before the accused person is called upon to make his defence, he shall be discharged in respect of such offence; or
>
> (*ii*) after the accused person is called upon to make his defence, he shall be acquitted in respect of such offence:

Provided that in any trial before a magistrate in which the prosecutor withdraws in respect of the prosecution of any offence before the accused is called upon to make his defence the magistrate may in his discretion order the accused to be acquitted if he is satisfied upon the merits of the case that such order is a proper one and when any such order of acquittal is made the magistrate shall endorse his reasons for making such order on the record.

(2) Where any private prosecutor withdraws from a prosecution for any offence under the provisions of this section the magistrate may, in his discretion, award costs against such prosecutor.

(3) A discharge of an accused person under this section shall not operate as a bar to subsequent proceedings against him on account of the same facts."

This section indicates that the proper order to be made when a prosecutor withdraws before the accused is called upon to make his defence is one of acquittal where there is no merit in the case. It is difficult to see why an accused person against whom a charge is withdrawn should be in a more favourable position than one against whom no case has been made out.

Applying this construction to the present case, it is plain that the discharge of the accused was on the merits and that accordingly the Magistrate was right to uphold the accused's plea, and that the High Court was also right in upholding the Magistrate's decision.

The problem in the present case would not have arisen had the Magistrate in the first trial acted under section 301. We do not say this by way of criticism becuase the law is certainly not as clear as it should be, but we think that although that section does not expressly say so, it is the duty of the Courts to apply it, and in dismissing a complaint, to state whether the dismissal is or is not on the merits. For these reasons we dismissed this appeal.

Appeal dismissed.

SAMUEL EGWURUBE *v* INSPECTOR-GENERAL OF POLICE

[C.A. (Sir Algernon Brown C.J., Bairamian S.P.J.)

February 13, 1957]

[Jos—Motion in Criminal Appeal No. JD/99A/1956]

Motion for leave to file additional grounds of appeal—Definition of "magistrate's court" in section 2 of Magistrates' Courts (Appeals) Ordinance—Section 36 does not apply to courts established under Magistrates' Courts (Northern Region) Law, 1955.

On the date of conviction the appellant's counsel gave verbal notice of appeal and filed a memorandum of the grounds of appeal which read as follows:—

"1. The decision is erroneous in point of law in that the appellant ought to have been acquitted.

2. Proper grounds of appeal are to be filed on receiving the record and judgment."

In a motion paper dated 6½ months after the date of conviction, appellant's counsel asked leave to file additional grounds of appeal.

Held:

(1) Section 36 of the Magistrates' Courts (Appeals) Ordinance does not apply to magistrates courts in the Northern Region, which were established by the Magistrates' Courts (Northern Region) Law, 1955.

(2) The procedure for appealing from a magistrate's court to the High Court of the Northern Region is governed by the Magistrates' Courts (Northern Region) Law, 1955.

(3) The High Court of the Northern Region has no power to grant leave to file additional gounds of appeal.

Cases referred to:

West v Police, XX N.L.R. 72, distinguished.

MOTION IN CRIMINAL APPEAL

Eso for the appellant-applicant.

Nunan, Crown Counsel, for the respondent.

Brown C.J. (delivering the judgment of the Court): This is a motion for leave to argue additional grounds of appeal. The appellant, who was represented in the court below, was convicted on the 23rd May. On the same day his Counsel gave verbal notice of appeal and

filed his memorandum which contained one ground only, viz. "the decision is erroneous in point of law in that the appellant ought to have been acquitted". This ground contravenes the provisions of sub-sections (1) and (3) of section 98 of the Magistrates' Courts (Northern Region) Law. A second paragraph of the memorandum informs us that "proper grounds of Appeal are to be filed on receiving the record and judgment". The motion paper is dated 4th December, 6½ months after the date of conviction. The affidavit in support is silent as to when the record of proceedings was received.

The practice of filing some ground or grounds of appeal within the 30 day period and of asking for leave to file additional grounds at a later date after the record of the case has been made available was approved by Hubbard, J. in the case of *West v Police*, XX N.L.R. 72. The Magistrates' Courts (Appeals) Ordinance was then in force in what is now the Northern Region, and section 36 of that Ordinance gave the Court a discretion to allow such amendments of the memorandum of the grounds of appeal as it thought fit. This section was considered to justify the practice of filing additional grounds, which in some cases might not only add to but entirely supersede the original grounds, provided that leave was obtained. That Ordinance, however, ceased to apply to the Northern Region when Magistrates' Courts in this Region were established by the Magistrates' Courts (Northern Region) Law. The definition of "magistrate's court" in section 2 of the Magistrates' Courts (Appeals) Ordinance is a court established under the provisions of the Magistrates' Courts Ordinance; and when section 2 was replaced by a new interpretation section in the Adaptation (Judicial Provisions) Order, 1955, the former definition of "magistrate's court" was maintained. The courts to which the Magistrates' Courts (Appeals) Ordinance now applies are the courts established under the Magistrates' Courts Ordinance. The Magistrates' Courts in the Northern Region were not established under that Ordinance. They were established under the Magistrates' Courts (Northern Region) Law, 1955, which by section 217 repealed the Magistrates' Courts Ordinance.

The procedure for appealing from a Magistrate's Court to the High Court is now governed by the Magistrates' Courts (Northern Region) Law; and section 36 of the Magistrates' Courts (Appeals) Ordinance has not been re-enacted in that Law. By section 94 the memorandum must be filed within 30 days; and the only provisions for amending the memorandum are contained in sections 51 and 52 of the High Court Law; they are designed for the sole purpose of enabling the Court to amend a ground of appeal which is already filed but which is not sufficiently or adequately worded to enable the respondent to understand the point which he has to meet, and have no application to the motion which is before us.

Egwurube v. I. G. P. Brown C. J.

Nor does section 58 of the High Court Law assist us. That section gives us the power to enlarge any period of time prescribed by the Magistrates' Courts Law. But here the original memorandum was filed within the statutory period of 30 days. There is no period to enlarge; the statutory requirement, so far as the original memorandum is concerned, was complied with.

Therefore we have no power under the existing law to grant this application; and the application is dismissed. But we think it right to add that in our view there ought to be some provision in the Magistrates' Courts Law which would give us this power, though not necessarily in the same terms as section 36 of the Magistrates' Courts (Appeals) Ordinance. Although we are of the opinion that the present application has no merits, we can conceive of a case where, for example, the accused is not represented by Counsel in the court below and he may have some genuine grievance which he may find it difficult to put into words himself or even to explain to Counsel whose advice he seeks, so that the only course open to Counsel is to wait until he can see a copy of the record in order to understand what his client's complaint is. In such a case, provided we were satisfied that there had been no undue delay, we should consider sympathetically an application to file additional grounds if some provision existed empowering us to do so.

Application dismissed.

DAN AZUMI *v* BAUCHI NATIVE AUTHORITY

[C. A. (Bairamian S. P. J., Smith J.) Assessors: M. Musa Chief Alkali of Bida and Alhaji Ibrahim Babban Malami of Kano] December 6, 1956

[Jos—Criminal Appeal No. JD/105A/1956]

Native Law and Custom—Moslem Law—Stealing goods—Need for evidence of ownership—Procedure in criminal cases—Cases sent by Junior to Chief Alkali—Proper way of sending up.

The Junior Alkali sent the appellant to the Chief Alkali stating that he was a habitual criminal and that the goods of X, who had identified them as his own, had been found in the appellant's possession. Without hearing any evidence, the Chief Alkali sent the appellant with a policeman to go to a place where the appellant said he had bought the goods and show the man from whom he had bought them. On the way the goods somehow disappeared. The Chief Alkali convicted the appellant of stealing the goods of X.

Held:

The Chief Alkali was wrong in asking the appellant to prove that he had bought the goods found in his possession and in convicting the appellant of stealing the goods of X, without hearing any evidence to show that the goods belonged to X.

Per curiam:

When the Junior Alkali sends up a case, he must not say that he has arrived at any opinion or that the accused person is a criminal and the Chief Alkali should hear the entire case without any preconceived ideas on any aspect of the case.

APPEAL FROM NATIVE COURT

Appellant in person.

Alcock, Crown Counsel, for the respondent.

Bairamian S.P.J. (delivering the judgment of the Court): This is an appeal from the Chief Alkali of Bauchi.

The record begins as follows:

"On the 10th July, 1956, the Junior Alkali sent Dan'azumi, a habitual criminal, to the Chief Alkali for having found in his possession stolen properties, which M. Abdu Lame saw a handbag

Azumi v Bauchi N. A. Bairamian S. P. J.

and a cap, he identified them to be his own, they are among the properties he has reported to the Charge Office being stolen from him since on 22 June, 1956.

Alkali said you hear Dan'azumi? He said no, they are not his own, I bought them from Kano. Chief Alkali said, I will send to Alkalin Kano, until I get his reply.

Later Alkali called him and put one N.A. Police to go to Kano with him and show him the man from whom he bought these properties. Shehu, N.A. Police, escorted him to Kano".

The record goes on to say that they came back and the policeman stated that on the way the exhibits disappeared and that he thought the appellant had thrown them out—which the appellant denied, whilst admitting that he said there was no point in going to Kano without the exhibits. The Chief Alkali found him guilty of stealing those properties and sentenced him to two years' imprisonment.

This conviction means that in the view of the Chief Alkali the handbag and the cap were the property of M. Abdu Lame; but the Chief Alkali, before whom the appellant denied that they were Abdu Lame's property, did not hear any evidence from Abdu Lame or anyone else to prove that they were Abdu Lame's property. It appears that the Chief Alkali accepted the view of the Junior Alkali that Abdu Lame identified the handbag and the cap as his property and proceeded to call on the appellant to prove his defence that they were his own property.

We must stress that the court which tries a person for an offence must hear the entire case; it is not permissible to have part of the case heard in one court and to accept its view and then hear the remainder of the case in the court which convicts the accused person. All the witnesses must be seen and heard by the court which convicts.

We are given to understand that a Junior Alkali may send up to the Chief Alkali an accused person with whom his jurisdiction does not enable him to deal adequately. If the Junior Alkali does so, he should send the accused person with a mere note that the case is one with which his powers do not enable him to deal adequately: he must not say that he has arrived at any opinion, and he must not say that the accused person is a habitual criminal, so as not to prejudice the fair trial of that person. And the Chief Alkali ought to hear the entire evidence free from any preconceived ideas on any aspect of the case, as if the accused person had not been before the Junior Alkali and what is more important, on the basis that the accused person, if he denies the charge, is presumed to be innocent and that the prosecution must first call their evidence and make out their case before the accused person can be asked to make his defence.

These fundamental rules were not observed at the trial and the failure to observe them vitiated the decision. There was no evidence before the Chief Alkali that the handbag and the cap were the property of M. Abdu Lame, consequently there could be no decision that they were his property and no decision that the appellant was guilty of stealing those goods. What is more, without that evidence being given before the Chief Alkali, the Chief Alkali ought not to have asked the appellant to go to Kano in order to show the man from whom he had bought the goods. The conviction of stealing must be set aside.

It is the only conviction before this court for consideration; upon whether or not the appellant was the person who threw the exhibits out of the lorry we do not think there is any need to pronounce; in fact we do not feel able to pronounce on that point for the reason that it was not adequately investigated.

The appeal is allowed and the appellant is acquitted.

Appeal allowed.

SANGARI *v* BAUCHI NATIVE AUTHORITY

[C.A. (Bairamian S.P.J. and Smith J. Assessors: Malam Musa, Chief Alkali, Bida, and Alhaji Ibrahim, Babban Malami, Kano) December 6, 1956]

[Jos—Appeal No. JD/97A/1956]

Native Law and Custom—Moslem Law—Stealing—Keeping money —No finding of intention to steal—Judgment without investigation of defence—Considerations on re-trial.

The appellant, a member of a native court, collected a sum of money from a person who had been fined and kept it without having it recorded. When accused of stealing the money, he produced it saying that he had collected it at the request of another member of the court who had tried the case against the person fined, and that the fine was not recorded because the scribe of the court was away and on his return was unwell. The Chief Alkali, without investigating the defence of the appellant, convicted him saying his offence was that he "received a fine . . and kept it for four months".

Held:

(1) It is not an offence to keep money, unless there is an intention to steal it; but there was no finding of any such intention in this case;

(2) The failure to investigate the appellant's defence vitiated the trial and the decision;

(3) A retrial would not be ordered, for no conviction of stealing could be had on the evidence.

APPEAL FROM NATIVE COURT

Appelant in person.

Alcock, Crown Counsel, for the respondent.

Bairamian S.P.J. (delivering the judgment of the Court): From the record it appears that there were two cases against the appellant but that it was only in respect of the second case that he was sentenced: there is this note in the penultimate paragraph:

"Alkali said your offence is you received a fine of £3 from Masoyi and keep it for four months."

What the offence is supposed to be is not clear: does it mean that Sangari stole the £3? It does not say so. If, on the other hand, it

only means that he received the money and kept it, without meaning to steal it, we are not aware that it is an offence merely to keep money for a time. Thus the record is unsatisfactory as a record of a conviction.

It is not clear how the Chief Alkali came to learn of this fine of £3 paid by Masoyi, but when he asked the appellant he at once said that he had received it and that Mallam Baba asked him to keep it as he was not the one who had tried the case; and he produced the £3 to the Chief Alkali. The appellant, who is a Court Member for his locality, expalined that he was away when the trial of Masoyi took place, and that when he came back Mallam Baba, who had tried the case, asked him to collect the fine from Masoyi and then asked him to keep it, that is to say as a depositary, because he was not the one who tried the case.

There is a note in the record that the appellant took an oath. He has explained to us that it was an oath that he was not the one who tried the case, which he took at the request of the Chief Alkali. We are advised that as a step in the trial the requirement of that oath was unwarranted.

The point, however, which has caused us grave concern is the absence of any investigation of the appellant's defence. He made a definite defence before the trial Court, that he collected the fine at the request of Mallam Baba, who had tried the case of Masoyi, and kept the money at his request; and we are advised that the Chief Alkali had a duty to call Mallam Baba and investigate the truth of that defence. The learned Assessors sitting with us advise us that—

> "It is not permissible for an Alkali to decide on the aspect of a case before investigating it"; and that—
>
> "There should be no judgment from an Alkali before he has heard the case completely".

The former maxim is from the Kitab-ul-Tufah and the latter from the Mukhtasar-el-Halil. The complete hearing of a case and the investigation of a case import consideration of the defence and investigation of it. The Chief Alkali had a duty to call Mallam Baba, but he did not; and this failure to call him was a failure to observe those maxims which vitiated the trial and the decision.

That is Moslem law; it is equally English law in essence. In English law if the defence of an accused person is not considered, the decision is regarded as unsatisfactory. Under either system of law the conviction in this case cannot be sustained and must be set aside.

The question arises whether the appellant should be acquitted or ordered to be re-tried. There seems to be no point in ordering a re-trial in a case in which the trial Court could not go the length of saying that the appellant was guilty of stealing the £3 he had collected.

Sangari
v.
Bauchi N. A.

Bairamian
S. P. J.

It is the only accusation on which we could order a re-trial, but it is an accusation on which there could be no conviction on the evidence in the case, and that is why we would not be wise if we ordered a re-trial.

We do not overlook the fact that it was unsatisfactory to collect a fine and not record it in the record book. Here again, the appellant gave a reason, namely that the scribe was away and then was unwell when he came back until shortly before the Chief Alkali came to the locality, and, as we guess, noticed that a fine had been inflicted but there was no note of its having been collected, which, as we guess, was the starting-point of his enquiry. The Chief Alkali, however, did not investigate whether there was some reason for the omission to record the fine as having been collected. We should certainly like to see the collection of a fine recorded at once; at the same time, before thinking ill of a member of the court, we should like the omission to record it at once investigated.

In our view the right course is to acquit the appellant.

Appeal allowed.

THE COMMISSIONER OF INCOME TAX *v* NIGERIA OIL MILLS LIMITED

[High Court (Smith J.) November 9, 1956]

[Kano—Interlocutory Matter—K/69/1956]

Practice and Procedure—Case filed for inclusion in Undefended List—Fact not brought to attention of Court—Judge making order for pleadings on request of defendants—Application to strike out order for pleadings and reinstate case in Undefended List—O.XXXIII r.12 Supreme Court (Civil) Procedure Rules—O.XXVIII r.12 Rules of Supreme Court of Judicature—section 81 Northern Region High Court Law—Whether application may be granted.

The facts of the matter appear sufficiently from the ruling.

Held:

(1) An order for pleadings made by a judge in chambers may be set aside by the judge sitting in court, but when the order was made in court, the judge has no power to set it aside;

(2) The court therefore had no jurisdiction to set aside the order

MOTION.

McLean, Crown Counsel, for the applicant.

Representative of the Company appeared for the defendants.

Smith J. The application for a writ of summons in this suit was filed in accordance with Order III, rr. 9 and 10 for inclusion in the "Undefended List". It was in fact set down in the general list of 22nd October when I made an order for pleadings. I must admit that I was not aware at the time I made the order that the suit should have been in the "Undefended List" nor was my attention drawn thereto by the representative of the plaintiff on that day nor by counsel for the defendant company. Mr McLean who now appears for the plaintiff moved the court for an order to amend the order for pleadings and to return the suit to the "Undefended List". This application was made under Order XXXIII which provides for the amendment of a defect or error in any proceedings at any stage in order to eliminate all statements which may tend to prejudice, embarrass, or delay the fair trial of the suit and for the purpose of determining the real questions or question in controversy between

Commissioner of Income Tax v. Nigeria Oil Mills Ltd.

Smith J.

the parties. This order is similar to Order 28 r. 12 of the Rules of the Supreme Court in England which says:—

> "The Court or a judge may at any time and on such terms as to costs or otherwise as the court or judge may think just, amend any defect or error in any proceedings and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings".

The notes on Order 28 r. 12 in the Annual Practice 1956, p. 469 show that the purpose of the rule is to make amendments in legal documents of every kind but not to set aside an order of the court which is in effect what the plaintiff is asking for in his application. The jurisdiction to set aside an order is to be found in section 81 of the Northern Region High Court Law which reads:—

> "Subject to the provisions of this law with respect to appeals in matters of practice and procedure, every order made by a judge in chambers, except such orders as to costs only which by law are left to the discretion of the court, may upon notice be set aside or discharged by the judge sitting in court".

Thus an order for pleadings made by a judge in chambers may be set aside by the judge sitting in court. But the order for pleadings which I made on 22nd October, though it might have been made in chambers, was in fact made in court; and it seems to me that because it was made in court I have no jurisdiction to set it aside.

Mr Baldwin, a director of the defendant company, represented them at the hearing of the motion. He frankly said, "We have never disputed liability. Nor do we dispute it. We are anxious to defer the matter as long as possible because we shall find it difficult to pay". This is an admission of liability for all the purposes of this case. But Mr Baldwin qualified his admission by saying in effect that, although the amount claimed is not disputed, the amount was not due to be paid on the 12th October, the date on which this action was filed; because on 27th October the defendant company received a letter from plaintiff enclosing another letter dated 4th September in which the defendant company was given 14 days in which to pay. By section 63 (*b*) of the Income Tax Ordinance "the Commissioner in his discretion may extend the time within which payment is to be made". Whether or not the letter received by the defendant company on 27th October supports Mr Baldwin's contention that the tax was not due on 12th October is a matter that remains in issue. This is now the only issue between the parties and I therefore make the following supplementary order as to pleadings.

The pleadings ordered on 22nd October are to be limited to this issue: Was the amount claimed by plaintiff due from the defendant company on the date when this action was filed?

Application refused.

ARDO YAHAYA MAYO HAKO *v* ADAMAWA NATIVE AUTHORITY

[C. A. (Bairamian S. P. J., and Smith J.) December 11, 1956]

[Assessors: Mallam Musa, Chief Alkali, Bida, and Alhaji Ibrahim, Babban Malami, Kano]

[Jos—Criminal Appeal No. JD/76A/1956]

Native Law and Custom—Moslem Law—Homicide—Need for proof that accused caused death—Lapse of time after assault.

The evidence was that the appellant kicked the deceased in the neck; that he fell and rose and moved on; that he died some days later; that during the intervening period he had much pain and that blood gushed from his nose and one of his ears. The appellant was convicted of committing accidental homicide (Khata).

Held:

As time had elapsed between the kick and the death, the next of kin should have been asked to take the kasama oaths that the kick caused the death; but they were not so asked, so there was no proof that the appellant was guilty of homicide.

Per curiam: In every case of homicide the first point to consider is whether there is evidence to show that it was the act of the accused which caused the death of the deceased.

APPEAL FROM NATIVE COURT

Appelant in person.

Alcock, Crown Counsel, for the respondent.

Bairamian S. P. J. (delivering the judgment of the Court): The appellant was accused before the Court of the Lamido of Adamawa of murdering one Barde of Mayo Hako; he was found guilty of committing the murder (homicide rather) unintentionally and sentenced to three years' imprisonment.

The evidence was that the appellant, while on horseback, kicked the deceased in the neck; the deceased fell and got up again, and apparently moved on; it was nine days later that he died; one witness said that two days before he died blood was gushing from one of his ears and his nose; another said that he spent a night with the deceased, who was groaning in pain, but the witness could not say how many days later it was that the deceased died; there was one more witness to the same effect.

Hako
v.
Adamawa N.A.

Bairamian
S. P. J.

Had we been trying the case in the High Court ourselves we would not have felt that there was evidence on which it could be said that it was the kick given by the appellant which caused the death of the deceased. It would have been the first point we would have considered: it is the first point to consider always in a case of homicide—whether there is evidence to show that it was the act of the accused which caused the death of the deceased. We understand from the learned Assessors that it is equally a question in Moslem law, and that in Moslem law it was necessary to ask the next of kin of the deceased, in view of the fact that time had lapsed between his being kicked and his death, to take the kasama oaths that it was the kick which caused his death. This was not done in the case, consequently there was no proof before the trial Court that the appellant was guilty of homicide.

The appeal was allowed and the decision was set aside and the appellant was acquitted yesterday; the reasons are given now for the sake of putting them on record.

Appeal allowed.

MAI RAI *v* BAUCHI NATIVE AUTHORITY

[C. A. (Bairamian S. P. J., and Smith J.) December 11, 1956]

[Assessors: Malam Musa, Chief Alkali, Bida, and Alhaji Ibrahim, Babban Malami, Kano]

[Jos—Criminal Appeal No. JD/109A/1956]

Native Law and Custom—Moslem law—Condemnation of absent person—Retrial—Former record used as basis.

In a former appeal the appellant, who had been convicted of homicide by the Court of the Emir of Bauchi, was ordered to be retried by the same Court. The record of the retrial was in identical terms with the record of the first trial. In convicting the appellant on the retrial the Court also condemned, in their absence, two other persons whom the appellant had mentioned as having taken part in the assault on the diceased.

Held:

The retrial had been merely a matter of form, and not a retrial in any true sense as ordered.

Per curiam: In Moslem law, as in English law, no person can be condemned in his absence.

CRIMINAL APPEAL FROM NATIVE COURT

Anionwu for the appellant.

Alcock, Crown Counsel, for the respondent.

Bairamian S. P. J. (delivering the judgment of the Court): The judgment states:

> "Mai Rai, the Court has found you, Sankwame and Ga-Allah guilty of murdering Koshe . . . You confirmed that you killed him out of your mouth in the affirmation you made before the Court. For that (those) reasons the Muhammadan Law confirms sentence of death on you all. However, your accomplices have absconded, but action is being taken to arrest them; when they are found sentence of death will be passed on them just as on you, after the Court has found them guilty".

It is distressing to read that the Court found, not only Mai Rai, who was before the Court, but also Sankwame and Ga-Allah, who were not not before the Court, guilty of murdering Koshe. Persons accused of an offence ought not to be condemned in their absence: for it is a rule of natural justice and good conscience both in our law and as the

Mai Rai v. Bauchi N. A. Bairamian S. P. J.

learned Assessors advise us, in Moslem law as well, that a person should first be heard before he is found guilty: he must be given an opportunity of defending himself always. It is an ancient rule; in ancient Greek there is a maxim—do not decide a case before you have heard what both sides have to say; in Latin there is the maxim *audi alteram partem*—hear the other side; the like rule obtains in Moslem law and in English law: in the Mukhtasar-el-Halil it is laid down that an Alkali shall not give judgment before investigating a case in its entirety. We are indeed sorry to see that pronouncement of the Court on Sankwame and Ga-Allah. We are, by section 27 of the High Court Law of this Region, precluded from making any order prohibiting the Court of the Emir of Bauchi from trying Sankwame (who, if we are not mistaken, has been arrested) or Ga-Allah for the murder of Koshe, but we hope that the Resident of Bauchi will see to it that they are tried in the High Court. We feel that we would not be doing our duty if we did not say so now, to forestall what may happen hereafter. We also feel that it would be well to inform the Court below what we think of this matter after consulting the learned Assessors sitting with us on this appeal of Mai Rai.

Mai Rai was before the High Court on appeal on the 22nd of August; he had been sentenced to death for the murder of Koshe, but the constitution of the Court below varied in the course of the trial: not all those who took part in the decision were present throughout the hearing; consequently the decision was set aside and an order was made for a re-trial in the Court of the Emir of Bauchi. Mai Rai was again sentenced to death and is appealing from the second decision.

It was Mr Anionwu who appeared for Mai Rai on his first appeal; he is again appearing for him in this second appeal. He tells us that the record of the second trial is identical with the record of the first trial; and Mr Alcock, who is appearing for the respondent, confirms that there is that identity. The appellant has filed an affidavit denying that he made a confession of guilt in the Court below and the other answers attributed to him in the record of the second trial. It would seem that the order of retrial was not carried out: for it is impossible to believe that after an interval of a considerable time either Mai Rai or Sake used the very words they had used at the first trial. We cannot escape the conclusion that the retrial was merely a matter of form, and that the record of the first trial was used as the basis of what purported to be a retrial.

Such being the case, we do not feel that there has been a retrial in any true sense: the order of the High Court in the first appeal was not carried out.

The decision appealed from is set aside, and an order is now made for the retrial of Mai Rai before a Court of competent jurisdiction,

namely the High Court of this Region sitting at first instance, in exercise of the powers conferred by section 67 (1) (*b*) (*ii*) of the Native Courts Law, 1956, on a charge of murdering Koshe of Sir on or about the 15th of October, 1955, in the Province of Bauchi, without prejudice to the Judge's power of amendment.

Appeal allowed;
retrial ordered.

MUTUAL AID SOCIETY LIMITED *v* F. A. OGONADE

[High Court (Hurley J.) January 28, 1957]
[Kano—Motion in Civil Suit K/37/1954]

Motion for issue of execution against immovable property—Section 43 *Sheriffs and Civil Process Ordinance—Order IV Rule* 16 (2) *Judgments (Enforcement) Rules—"reasonable diligence".*

The facts appear from the judgment.

Held:

Under Order IV Rule 16 (2) the judgment creditor must furnish evidence of what has been done to find the judgment debtor's movable property; and the Court will then decide whether or not reasonable diligence has been shown.

MOTION

Shyngle for the judgment creditor.

Judgment debtor in person.

Hurley, J. This is an application by a judgment creditor for the issue of execution against immovable property of the judgment debtor in Kaduna. By section 43 of the Sheriffs and Civil Process Ordinance (Cap. 205) execution may issue against the immovable property of a judgment debtor if no movable property of the judgment debtor can with reasonable diligence be found or if such property is insufficient to satisfy the judgment debt, and if the judgment debtor is the owner of any immovable property. Rule 16 (2) of Order IV of the Judgments (Enforcement) Rules requires that an application for the issue of execution against immovable property shall be supported by evidence showing what steps have been taken to enforce the judgment and with what effect, and showing further that no movable property of the judgment debtor, or none sufficient to satisfy the judgment debt, can with reasonable diligence be found.

The present application is supported by an affidavit made by the Kano manager of Mutual Aids Society Limited, the judgment creditor, from which it appears that in June, 1955, a writ of execution and sale was issued against the movable property of the judgment debtor, and that "on the 12th September, 1955, the writ of attachment was returned by the Deputy Sheriff who stated that the writ could not be executed as the defendant had left town". It is not stated what town is referred to. In October, 1955, it next appears, some immovable

property of the judgment debtor's at Kaduna was attached and sold, but the proceeds of sale were less than the amount of the judgment debt and costs, and a balance of some £158 remains due. The affidavit deals further with the steps taken to satisfy the judgment, and to find the judgment debtor's movable property, in the following words:—

> "8. That on the 10th August, 1956, our Solicitor addressed a letter to the Defendant at his new address at 90 Agbeni Street, Ibadan, calling upon him to pay this amount immediately.
>
> "9. That I am informed by our lawyer, Mr Shyngle, and I verily believe, that the Defendant did not even acknowledge the receipt of this letter.
>
> "11. That the Defendant is now living at Ibadan and no movable property of his can with reasonable diligence be found".

That is all and it is not enough. It is not enough for a deponent to make the bare averment that no movable property of the judgment debtor can with reasonable diligence be found. It is for the Court, not the deponent, to say whether reasonable diligence has been exercised. The judgment creditor is to supply the Court with evidence of what has been done to find the judgment debtor's movable property, and the Court will then decide whether reasonable diligence has been shown. All that the judgment creditor here has shown to have been done is that a Deputy Sheriff in some single unspecified locality returned a writ because the judgment debtor was no longer there, and that the judgment debtor is now in Ibadan and did not answer a demand for payment contained in a letter which there is no evidence he ever received. Upon that material, I cannot say that it has been shown that no movable property of the judgment debtor can with reasonable diligence be found.

I would observe that the fact that the judgment debtor is now living at Ibadan has no bearing on the question, upon the facts so far as they have been disclosed. The judgment creditor can levy execution upon the judgment debtor's property in Ibadan, or elsewhere outside the Northern Region and within Nigeria, by registering his judgment outside this Region and proceeding thereon in the manner prescribed in Part VII, sections 103 ff., of the Sheriffs and Civil Process Ordinance, as added to by the Adaptation of Laws (Judicial Provisions) Order, 1955.

Application dismissed.

S. I. DABIRI *v* V. O. DABIRI

[High Court (Hurley J.)—March 22, 1957]

[Kano—Motion in Civil Suit K/34/56]

Application for the evidence of a witness to be taken prior to the hearing—Order XIII Rule 2 *Supreme Court (Civil Procedure) Rules.*

The facts appear from the judgment.

Held: Apprehension of a witness that he will be dismissed from his employment if he comes to court to give evidence is not a ground for making an order under Order XIII Rule 2 of the Supreme Court (Civil Procedure) Rules.

Per curiam: If there was evidence that the witness had been threatened with dismissal if he came to court in compliance with a subpoena, the Court would call upon his employer to appear and show cause why he should not be punished for contempt.

Cases referred to:

Warner v. Moses, 16 Ch. D. 100 applied.

Macaulay v. Seriki, VI N.L.R. 92, distinguished.

MOTION

Shyngle for the applicant.

Hughes for the respondent.

Hurley, J. This is an application under Order XIII, rule 2, for an order for the examination in Yola of a witness whose evidence the plaintiff wishes the court to have before it. Order XIII, rule 2, provides that the court may, in any cause or matter where it shall appear necessary for the purpose of justice make any order for the examination before any officer of the court, or other person, and at any place, of any witness or person. In support of the application, the plaintiff has made an affidavit which shows that the evidence which the witness is to give is material to his case, and which exhibits a letter from the witness that shows that he is afraid that he will lose his employment if he leaves Yola to come to Kano to give evidence. In the letter the witness says this—"I had just through struggle picked up a temporary job here in Yola as a daily paid man who is not entitled to leave," and lower down

S. I. Dabiri v. O. Dabiri
Hurley, J.

he says "I am now working, and I would neither will attempt to part with my work, I am not a permanent man, but daily paid. I cannot attempt to apply for permission to proceed Kano on another man's business parting with my job. You knew my suffering at Kano for 2 years no job."

Rule 2 of Order XIII is in the same terms as rule 5 of Order 37 of the English Rules of the Supreme Court. The practice under that rule is explained in a note in the Annual Practice accurately citing the case of *Warner v. Moses*, 16 Ch. D. 100. The rule was held to be confined to cases where it appears necessary for the purposes of justice to examine witnesses otherwise than *viva voce* in open court at the hearing or trial of the action, and accordingly in general to be applicable only where witnesses are going abroad, or where from age, illness, infirmity or some other cause they are likely to be unable to attend at the trial. There is no reported case where a witness' evidence was taken by examination solely on the ground that he was afraid that he would lose his employment if he attended court to give evidence. Mr Shyngle, moving for the order, has cited *Macaulay v. Seriki*, VI N.L.R. 92, where at the conclusion of the case for both parties the judge made an order for examination upon interrogatories of a witness in another part of Nigeria, though no particular reason appeared why the witness should not have come to court. But that order, it is quite clear from the report, was made with the consent of both parties, whereas here Mr Hughes for the respondent opposes the making of the order sought. As I have said, there is no reported case where an order was granted under this rule or the corresponding English rule simply for the reason that the witness was afraid to come to court in case he might lose his job as a result of doing so. The case put on behalf of the applicant is really no higher than that. It does appear that the witness is afraid that he will lose his job if he comes, but the applicant put before the court absolutely no evidence whatever to show that he will lose it. There is nothing to show that the witness has asked permission to attend court should he be subpoenaed and has been told that permission will not be given. There is no evidence from him or anybody else that he will really be dismissed if he comes.

For those reasons this order will be refused. But I would add this: if there were evidence, solid evidence, that the witness had been threatened with the loss of employment should he leave Yola to come to Kano to give evidence in this case, or if there were evidence that he reasonably apprehended loss of employment on those grounds, even so it would be

unlikely that I would make an order under this rule. What I should do in such a case would be to call upon the employer of the witness to appear in court and justify or explain his attitude, under pain of punishment for contempt.

Application dismissed.

HILARY OKORONKWO *v* INSPECTOR-GENERAL OF POLICE

[Federal Supreme Court (Foster Sutton F.C.J., Jibowu and de Lestang F.JJ.)—March 29, 1957]

[*Jos—Interlocutory Criminal Matter—F.S.C.* 56/1957]

Criminal Procedure—Appeal from Magistrate's Court to High Court of the Northern Region—Application for extension of time in which to file additional grounds of appeal—section 58 *Northern Region High Court Law* 1955—*Whether "enlarge" includes "extend".*

Cases referred to:

Egwurube v Inspector General of Police, 1957 N.R.N.L.R. 102 disapproved.

APPLICATION INTERLOCUTORY CRIMINAL MATTER

Shyngle for the appellant;

McLean, Crown Counsel, for the respondent.

Foster Sutton, F.C.J. (delivering the judgment of the court): Both Counsel informed us that the High Court, sitting in its appellate capacity, refused this application for an extension of time within which to file additional grounds of appeal because it felt itself bound by its previous decision in the case of *Samuel Onayi Egwurube v the Inspector General of Police*, 1957 N.R.N.L.R., in which it was held that the power to enlarge any period of time prescribed by the Magistrates' Courts (Northern Region) Law, 1955, conferred by section 58 of the Northern Region High Court Law, 1955, does not include a power to extend the time after the period prescribed has expired.

In our view the court in its previous decision placed too narrow a construction on the meaning of the word "enlarge" which is not a term of art and ought to be given its ordinary dictionary meaning. If this is done we are of the opinion that the word "enlarge" includes "extend" whether or not the time prescribed has passed. We are fortified in this view by the meaning ascribed to the words "enlarge" and "extend" by the Shorter Oxford Dictionary, and to "enlarge" by Wharton's Law Lexicon.

Okoronkwo v. I.G.P. Sutton, F.C.J.

Moreover, in our view, the court clearly had inherent jurisdiction, once the appeal was properly before it, as this one was, to grant leave to amend the grounds of appeal, and we are of the opinion that it could properly have treated the application as such.

This appeal is accordingly allowed, and we remit the case to the court below to deal with the matter in accordance with this decision.

Appeal allowed.

REGINA *v* AGBEZE ONUEGBE

[Federal Supreme Court (Foster Sutton F.C.J., Jibowu and de Lestang F.JJ.)—April 1, 1957]

[Jos—Criminal Appeal—F.S.C. 29/1957]

Criminal Law—Evidence—Corroboration of Accomplice—Accused incriminating co-accused—Whether corroboration required—section 177(2) *Evidence Ordinance* (*Cap.* 63).

The four appellants were charged with murder. A *nolle prosequi* was entered in respect of one Ejembi who then gave evidence for the prosecution. He was clearly an accomplice. At the trial, the first appellant gave evidence on oath. The trial judge administered to himself the usual warning as to corroboration of the accomplice Ejembi's evidence, and proceeded to take the same course with the evidence of the first appellant.

Held: The wording of section 177(2) of the Evidence Ordinance is precise and unambiguous, and means what it says, namely that where persons are tried jointly and one of them gives evidence on his own behalf incriminating a co-accused, the accused who gives such evidence shall not be considered to be an accomplice.

Per Curiam: The Legislature has not given a discretion to the court, the words of the section are not "it shall not be obligatory upon the court to consider such person an accomplice" but "shall not be considered to be an accomplice".

Cases referred to:

Davies v Director of Public Prosecutions (1954) *A.C.* 378, *referred to.*

[*Editorial Note.*—This question is referred to in *Rex v Martin* (1910) 5 Cr. App. R. 4. It is then dealt with in the classic case of *Rex v Barnes and Richards* 27 Cr. App. R. 154, especially on page 167 which confirms the principle now enunciated despite the decision in *Rex v Dean* 18 Cr. App. R. 21. The whole law of accomplices was considered *in extenso* in *Davies v Director of Public Prosecutions* (1954) A.C. 378; 38 Cr. App. R. 11; (1954) 1 AER 507. That is the law of England. In Nigeria the question is dealt with in *Rex v Adebowale* 7 W.A.C.A. 142, where the West African Court of

Appeal followed *Rex v Barnes and Richards* (*supra*). In *Oriaku v Police* XX N.L.R. 74, which was followed in *Peter Ajaegbu v Inspector General of Police*, 1956 N.R.N.L.R. 87, Hubbard J. sought to make an exception to section 177 (2) where the prosecution case rests upon the incriminating evidence of a co-accused, and held that in such a case corroboration was required. In *Badmos v Commissioner of Police* 12 W.A.C.A. 361 the court accepted criticism of the case of *Barnes and Richards*, but were of opinion that even if the criticism were true, s. 177 (2) Evidence Ordinance was now the law of Nigeria. s. 177 (2) was quite clearly applied in *Rex v Gyang and Nafan* 14 W.A.C.A. 584, without any misgiving.]

CRIMINAL APPEAL

Dass for the 1st, 2nd, and 3rd Appellants.

Agbakoba for the 4th Appellant.

Lewis, Crown Counsel, for the Respondent.

Foster Sutton F. C. J. (delivering the judgment of the Court, dealt first with other aspects of the appeal and then continued):

In the case of the 4th appellant the learned trial judge, having warned himself that it was dangerous to convict on the evidence of an accomplice unless it was corroborated, states in his judgment that he believed the evidence of Ejembi Edache, who was clearly, in law, an accomplice, and having administered the same warning to himself regarding the evidence of the 1st appellant, states that he also believed that portion of the prisoner's evidence which implicated appellant No. 4.

This he was clearly entitled to do, and having so found there can be no doubt that there was ample evidence to justify the conviction for murder against the 4th appellant. His appeal was accordingly dismissed.

As we have already said, Ejembi Edache was clearly, in law, an accomplice. The learned trial judge was, therefore, bound to administer the warning already referred to in the case of his evidence, but we think it must be stressed that it was not necessary or competent to warn himself similarly in the case of the evidence given by the 1st appellant implicating the 4th appellant.

The four appellants were tried jointly, and section 177 (2) of the Evidence Ordinance (Cap. 63) provides as follows: "Where accused persons are tried jointly and any of them

Regina v Onuegbe — Sutton, F.C.J.

gives evidence on his own behalf which incriminates a co-accused the accused who gives such evidence shall not be considered to be an accomplice".

It has long been held in England that the necessity of administering such a warning only applies in the case of an accomplice who is called as a witness by the prosecution. That principle was recently re-affirmed by the House of Lords in the case of *Davies v Director of Public Prosecutions* (1954) A.C. 378.

Section 177 (2) of the Evidence Ordinance merely enshrines in legislation a principle of law which, as already said, has over a long period prevailed in England. The wording of the subsection is precise and unambiguous and it is the duty of the courts to expound those words in their natural and ordinary sense. In our view, the subsection means what it says, and it necessarily follows that the necessity of administering a warning which arose in the case of the evidence of Ejembi Edache, did not arise in the case of the evidence of the co-accused, Agbeze Onuegbe.

The learned trial judge construed the section as leaving the court with a discretion as to whether or not it should administer a warning in such a case. If the legislature had so intended it would, no doubt, have said "it shall not be obligatory upon the court to consider such a person an accomplice", but it did not, it said "shall not be considered to be an accomplice". In saying this, we trust that it will not be thought we mean to convey that it is not open to a trial court to reject the evidence of a co-accused on some other ground, for example, that it does not believe the witness.

Appeals of first three appellants allowed; *Appeal of 4th appellant dismissed.*

EFFIONG EKPO *v* KANO NATIVE AUTHORITY

[C. A. (Sir Algernon Brown C. J. and Smith J.)
(Assessors: Mallam Abubakar, Chief Alkali of Gwandu, and Mallam Abdulahi, Chief Alkali of Kontagora) April 4, 1957]

[Kano—Criminal Appeal No. K/59A/56]

Trial of non-Moslem in Moslem court—Order-in-Council made under section 8 of the Native Courts Ordinance—purported record of proceedings not taken contemporaneously with the trial—alleged admission of guilt.

The appellant, who was a native of Calabar and a non-Moslem, contended that the Court of the Emir of Kano had no jurisdiction to try him. A document which purported to be the record of the proceedings was not made at the time of the trial. It stated that a report describing the offence was read out to the appellant, who was asked if what it said was true, and that the appellant "did not deny any part of it". The appellant complained that he made no admission of his guilt and was given no opportunity to make a statement or to put forward his defence.

Held:

(1) By the Order-in-Council made under section 8 of the Native Courts Ordinance, the Court of the Emir of Kano had jurisdiction to try the appellant;

(2) the record of proceedings must be made contemporaneously with the trial;

(3) in Maliki law, as in English law, silence cannot be interpreted as an admission of guilt; and unless there is an affirmative admission evidence as required by Moslem law must be called;

(4) when the proof relied upon is the accused's admission of guilt, the record must show clearly what he said, "preferably by recording the actual words which he spoke".

CRIMINAL APPEAL

Appellant in person.

McLean, Crown Counsel, for the respondents.

Brown, C. J. (delivering the judgment of the Court): The appellant was convicted in the Emir of Kano's Court of stealing £40, and of assaulting a member of the Police Force

Ekpo v Kano N.A.
Brown, C.J.

while performing his duty. He was sentenced to four years' imprisonment.

The appellant is a native of Calabar, and a non-Moslem. He appears before us in person, and the first point that he made was that as a non-Moslem the Court of the Emir of Kano had no jurisdiction to try him. That point is disposed of by section 1 of the Order-in-Council made under section 8 of the Native Courts Ordinance. Paragraph (*b*) of that section gives to the Emir of Kano's Court jurisdiction over all persons who are within the area of the native authority's jurisdiction, and whose general mode of life while there is that of the general native community.

There can be no doubt that although the appellant is not a Moslem, the court had jurisdiction to try him by Moslem law. The question which we have to decide is whether his trial conforms with the requirements of Moslem law.

The appellant was convicted on the 24th June. The only document purporting to be a record of the trial is dated the 1st October. We stood this appeal over from the last Sessions in order that a contemporary record, taken at the trial, might be produced. None has been forthcoming. Therefore it would appear that the writer of this document dated the 1st October has given his recollection of what occurred three months previously.

The document reads as follows:—

"Wali's Office,
Kano, 1st October, 1956

Kano N.A. Police v Effiong Ekpo

On 24-6-56 the N.A. Police brought Effiong Ekpo before the Emir on the charge of stealing money in the Mixed Court room. The following is the report:—

On 9-5-56 Effiong Ekpo stole the amount of £17 belonging to an Ibo woman in the Sabon Gari market. He was taken before the Mixed Court where he was imprisoned for one year on 22-6-56.

On that same day, 22-6-56, before the case was concluded Effiong Ekpo was sitting in the Court room with one Edward. Edward had £40 in currency notes in a purse which he placed in the back pocket of his trousers. Effiong managed to steal this money and hid it in his own pocket. After a short while Edward groped in his pocket but did not find his money. He raised an alarm the Nigeria Police and the N.A. Police asked him the reason and he replied that his money was stolen. So

they searched every one that happened to be in the room at the time. They found the money with Effiong Ekpo but he managed to throw away £1 note and so £39 was found. In trying to recover this amount Effiong Ekpo assaulted a Nigeria Police member by beating him with a stick and tearing his hat.

When the report was read out Effiong Ekpo was asked if all what was said was true. He did not deny any part of it. So the Emir after consulting his Court members imprisoned him for 4 years for stealing in the Court room and for assaulting a member of the police force while performing his duty.

(*Sgd*) MAG. JIBIR DAURA,
for Walin Kano

(*Sgd*)
Certified true translation.
ISM."

In Maliki law, the offence of stealing must be proved either by the accused's admission or by the evidence of two credible witnesses. The appellant complains that the owner of the money was not called to give evidence. That would not be necessary in Maliki law if there was an admission by the appellant that he stole the money. He, however, complains that he made no admission and was given no opportunity to make a statement or to put forward his defence. That is the crux of the matter. The respondents rely on that portion of the document which says:

> "When the report was read out Effiong Ekpo was asked if all what was said was true. He did not deny any part of it."

But non-denial of the facts stated is not the same as an admission of their truth. And what are we to understand from that passage of the document? Did he remain silent, or did he admit affirmatively that the report which was read out to him was true? Where the proof relied upon as establishing this charge is the accused's admission, the admission must be clear and unequivocal. Silence may be due to many causes. To name one, silence may be due to an accused person imperfectly understanding the proceedings of a court where the procedure is unfamiliar to him, and where the language is not his own. In English law, and under the Criminal Procedure Ordinance, in no circumstances can silence be accepted as a plea of guilty to a charge; and if a person "stands mute of malice" or from any other cause,

Ekpo v. Kano N.A.
Brown, C.J.

a plea of not guilty must be recorded and evidence must be called. We are advised by our Assessors that the rule is the same in Maliki law. Silence cannot be accepted as an admission of the offence; and unless there is an affirmative admission, evidence as required by Maliki law must be called, before the accused can be convicted and punished. For that reason this trial, so far as we are able to understand the document which purports to be the record, was defective in a vital matter.

As a record of the trial, we criticise this document. We are not saying that in every case the record must be a verbatim record; but we do say that the record, whether it be in the form of notes or of indirect speech or a recording of the words which were actually spoken, must be (*a*) contemporaneous with the trial—that is to say, made when the trial is going on; (*b*) when the proof relied upon is the accused's admission of guilt, the record must show clearly what he said, preferable by recording the actual words which he spoke.

From the material before us, we are not satisfied that this man was properly tried. There must be a retrial. The question is: before what court? If this case had come to us from a magistrate's court, we should have no hesitation in ordering a retrial before another magistrate. We should do this, because the original magistrate would inevitably have formed a view of the matter which might be an embarrassment to him in conducting a fair and impartial retrial. For the same reason, we have come to the conclusion that the interests of justice—which must include the *appearance* of justice—require that the appellant shall be retried before a magistrate.

The appeal is allowed and the conviction is set aside. The appellant is remanded in custody, to be retried before the Kano Magistrate.

Re-trial ordered.

MALLAM MAMMAN TUNGAR MAIZABO AND OTHERS *v* SOKOTO NATIVE AUTHORITY

[Federal Supreme Court (Foster Sutton F.C.J., Jibowu F.J., and de Lestang F.J.) April 5, 1957]

[Jos—Criminal Appeal F.S.C. 5/1957]

Conviction for homicide in Moslem Court—Sentence of death—Powers of High Court under section 67 *Native Courts Law*, 1956, *when evidence upon the record suggests manslaughter under the Criminal Code—section* 10*A Native Courts Ordinance, Cap.* 142.

The appellants were convicted of intentional homicide in the Court of the Sultan of Sokoto and sentenced to death. At the trial there was evidence of provocation which, if accepted, might have reduced the offence to manslaughter if the trial had taken place under the Criminal Code. The High Court of the Northern Region had dismissed the appeals upon the ground that they were precluded from considering the question of manslaughter by the decisions of the Federal Supreme Court in *Jalo Tsamiya v. Bauchi Native Authority*, 1957 N.R.N.L.R. 73, and *Fagoji v. Kano Native Authority*, 1957 N.R.N.L.R. 84.

Held:

(1) Section 10A of the Naitve Courts Ordinance empowers native courts to ignore the Criminal Code in trying offences under native law and custom.

(2) The proviso to section 10A requires native courts to ascertain which offence under the Criminal Code the act or omission constitutes, and not to impose a punishment greater than that provided by the Criminal Code for such offence. Thus, in trying a case of homicide under native law and custom, they are required to consider if the offence would be manslaughter under the Criminal Code; and if so, they are not to impose a greater punishment than the punishment provided for manslaughter in the Criminal Code.

(3) Where a native court has imposed a sentence of death for an offence of homicide under native law and custom, the appellate court may:—

(*a*) If it is satisfied that the offence was manslaughter

Maizabo and others v Sokoto N.A.

Sutton, F.C.J.

under the Criminal Code, substitute a sentence of imprisonment for the sentence of death; or

(*b*) if it is in doubt whether the offence was murder or manslaughter under the Criminal Code, order a retrial before a court which will apply the Criminal Code.

Cases referred to:

Jalo Tsamiya v Bauchi Native Authority, 1957 N.R.N.L.R. 73;

Fagoji v Kano Native Authority, 1957 N.R.N.L.R. 57.

CRIMINAL APPEAL

Anionwu for the appellants;

H. H. Marshall, Q. C., Attorney-General, and *McLean Crown Counsel* for the respondent.

Foster Sutton, Chief Justice of the Federation (delivering the judgment of the Court):—

The four appellants together with four other persons, who have not appealed, were tried in a Native Court, namely, the Sultan of Sokoto's Court in the Northern Region of Nigeria, for an offence against native law and custom, to wit, intentional homicide. They were convicted and sentenced to death.

For reasons which will be apparent later in this judgment, we do not propose to set out the facts of this case in detail. Suffice it to say that there was evidence at the trial which, if accepted, could, in a trial for murder under the Criminal Code, have established provocation in law, thus reducing the offence to manslaughter and rendering the appellants liable to be sentenced to terms of imprisonment, but not to death. As, however, provocation is unknown to Maliki law which is the law properly administered by that Native Court, the question of provocation was neither investigated nor decided by the trial court.

The appellants appealed to the High Court of the Northern Region. In dismissing their appeals the High Court said this: "Questions of manslaughter might have arisen if this case had been tried under the Criminal Code. But in the light of the Federal Supreme Court decisions in *Jalo Tsamiya v Bauchi Native Authority* and *Fagoji v Kano Native Authority* this Court is precluded from considering the question of manslaughter."

These remarks were perfectly legitimate because there can be no doubt that this Court decided in *Jalo Tsamiya's*

case that where a person had been properly convicted of intentional homicide in a native court applying Maliki law and sentenced to death, but that the offence might have been manslaughter under the Criminal Code, the High Court in its appellate jurisdiction ought not to order a retrial so as to make it possible for a verdict of manslaughter to be found. In *Fagoji's* case this Court merely followed its previous decision in *Jalo Tsamiya's* case.

Having regard, however, to the great importance of this matter and in particular since it affects the life of the subject, we felt it right to hear fresh arguments with a view to reconsidering, if necessary, the decisions of this Court in the two cases under reference.

We are indebted to learned Counsel for the appellants and in particular to the Attorney-General of the Northern Region for their arguments and after giving careful consideration to them, we have come to the conclusion that the decision in *Jalo Tsamiya's* case is too wide and requires qualification.

The power of the High Court in its appellate jurisdiction to order a retrial of an appellant is contained in section 67 of the Northern Region Native Courts Law 1956, which reads as follows:—

"67. (1) Any court (other than the Federal Supreme Court) exercising appellate jurisdiction in criminal matters under the provisions of this Law may in the exercise of that jurisdiction—

(*a*) if such court considers that there is no sufficient ground for interfering with the decision appealed against, confirm that decision and dismiss the appeal;

(*b*) if such court considers that there is sufficient ground for interfering with the decision appealed against, set aside that decision, and either—

(*i*) acquit the appellant; or

(*ii*) order the retrial of the appellant before a court of competent jurisdiction on the same charge or accusation or on any charge or accusation which might have been laid on the facts as disclosed by the evidence; or

(*iii*) after hearing the whole case or not and whether in whole or in part substitute any other decision (whether as to guilt or punishment) which the court of first instance could have made, but so that, by the decision so substituted, the appellant shall not be found guilty of any offence of

Maigabo and others
v.
Sokoto N.A.
Sutton, F.C.J.

which he was not accused before the court of first instance, unless the appellate court is satisfied that the defence of the appellant before the court of first instance would not have been substantially affected if he had been so accused; or

(*iv*) substitute a special finding to the effect that the appellant was guilty of the act or omission charged, but was insane so as not to be responsible by virtue of the provisions of section 28 of the Criminal Code for his conduct at the time when he did the act or made the omission, and thereupon the appropriate provisions of Part XXV of the Criminal Procedure Ordinance shall apply.

(2) Any powers conferred by subsection (1) of this section may be exercised notwithstanding that the decision of the court of first instance was correct by native law and custom.

(3) At any stage of the proceedings on an appeal, the appellate court may order evidence to be adduced."

On the face of this section the power of the appellate court to order a retrial is very wide and may be exercised whenever such court considers that there is sufficient ground for interfering with the decision appealed against and notwithstanding that the verdict of the court of first instance was correct by native law and custom. In *Jalo Tsamiya's* case this court held that "native courts have no jurisdiction to administer any section of the Criminal Code which is not specified in the Order in Council under section 12 of the Native Courts Ordinance, 1933 (now section 20 of the Northern Region Native Court Law, 1956)". With this part of the decision we agree subject, however, to the qualification that Native Courts are bound to conform with the provisions of the Criminal Code in regard to sentences, as will be seen later in this judgment. This court proceeded further to say in effect that because in section 67 (1) (*b*) (*iii*) the High Court could not substitute a conviction for manslaughter for a conviction for murder, it followed that it was not the intention of the legislature to permit it to achieve the same object by ordering a retrial and it concluded that this power of ordering a retrial could not have been intended to apply to homicide cases. We think, on further reflection, that this court was in error in that it failed to draw the distinction between ordering a retrial and itself substituting another conviction, which are two

totally different things. The legislature might very well without running the risk of being accused of inconsistency permit the former and prohibit the latter.

Are there, however, any restrictions on the power of the High Court to order a retrial? We think that there are and that they are to be found in section 22 of the Northern Region Native Courts Law, 1956, which is not yet in force, but which reproduces verbatim section 10A of the Native Courts (Amendment) Ordinance, 1951, which is still in force and which reads as follows:—

"10A. Subject to the provisions of this Ordinance, but notwithstanding anything contained in the Criminal Code Ordinance, where any person is charged with an offence against native law or custom, a native court may try the case in accordance with native law or custom even though the act or omission constituting the offence may also constitute an offence under the provisions of the Criminal Code or of any other enactment:

Provided that where an act or omission constituting an offence against native law or custom also constitutes an offence under the provisions of the Criminal Code or of any other enactment, a native court shall not impose a punishment in excess of the maximum punishment permitted by the Criminal Code or such other enactment."

This section is clear and unambiguous. The first paragraph of it empowers Native Courts in effect to ignore the Criminal Code in trying offences under native law and custom. The proviso, on the other hand, seeks to establish uniformity of punishment and to harmonise the penalties under native law and custom with those of the Criminal Code. To comply with the proviso, the native court must first ascertain which offence under the Criminal Code the act or omission constitutes. Having done this it must not impose a punishment greater than that provided by the Criminal Code for such an offence. Consider, for example, a case of theft tried by a native court applying Maliki law. It is well known that under Maliki law the punishment for theft was amputation. Under the Criminal Code there are many categories of theft punishable with varying terms of imprisonment. The native court must, therefore, first of all ascertain in which category the act of theft proved before it falls, and it must then be careful not to impose a punishment greater than that prescribed for that category of theft by the Criminal Code. We realise that this is a complicated procedure for a native court to follow and that the task of a

native court in a case of homicide which is intentional homicide by Maliki law, and manslaughter under the Criminal Code, is an almost impossible one. Nevertheless, this is the clear meaning of the proviso and effect must be given to it. We might add, incidentally, that we are fortified in our interpretation by the frank admission of the Attorney-General that it accords with the undoubted intention of the legislature.

The position, therefore, as we see it is this. While a native court may and indeed must ignore the provisions of the Criminal Code in trying a case under native law and custom, it must not impose a punishment in excess of the maximum punishment permitted for that act or omission under the Criminal Code or other enactment.

Lest it be thought that in arriving at our decision we have omitted to consider section 62 Northern Region High Court Law, 1955, we would like to say that, in our view, that section has no application in the matter under consideration.

Two conclusions emerge from this: (1) that the failure of a native court to observe any provision of the Criminal Code in trying a case under native law and custom can never be "sufficient ground for interfering with the decision" under section 67 (1) (*b*) (*ii*) and section 67 (2) of the Northern Region Native Court Law, 1956. If it were otherwise we would have the absurd position that the legislature is on the one hand permitting the native court to ignore the Criminal Code and on the other hand empowering the appellate court to quash its decision because it has ignored the Criminal Code; (2) that where the native court has imposed a punishment in excess of that permitted by the Criminal Code or other enactment, the appellate court may either substitute the proper punishment under section 67 (1) (*b*) (*iii*) or if for any reason it is not in a position to do so, order a retrial of the appellant under section 67 (1) (*b*) (*ii*).

The following illustration will explain what we mean. Suppose that "A" is convicted of intentional homicide by a native court applying Maliki law and sentenced to death. Suppose also that if "A" had been tried under the Criminal Code the question of provocation would have arisen. In such a case the appellate court may do one of two things: (*a*) if it is satisfied that the act of "A" constitutes manslaughter under the Criminal Code, it may substitute a sentence of imprisonment for the sentence of death passed by the native court, because this is the sentence which the native court, not only could, but ought to have passed under the proviso to section 10A. (*b*) If it is doubtful whether the act of "A"

constitutes murder or manslaughter under the Criminal Code and it is thus impossible for it to ascertain the correct sentence it may order a retrial before a court applying the Criminal Code in order that the position may be clarified.

In *Fagoji's* case the High Court held that "in considering the exercise of the power contained in subsection 2 (section 67 (2) Northern Region Native Court Law, 1956) we must have regard to the provisions of the Criminal Code". With great respect this, in our view, is precisely what the appellate court must not do, subject to the qualification already mentioned, namely, that it may order a retrial where the proviso to section 10A has not been complied with. To recapitulate, we are of opinion that this Court erred in *Jalo Tsamiya's* case in holding that the power to order a retrial conferred by section 67 of the Northern Region Native Courts Law, 1956, was not intended to apply to homicide cases tried in Native Courts. In our view this power is of general application and may be exercised where there is sufficient ground for interfering with the decision appealed against, provided that the failure of a native court to follow the provisions of the Criminal Code cannot constitute sufficient ground except in the case of non-compliance with the provision to section 10A.

Finally, as it appears to be the intention of the legislature to preserve the integrity of native courts and their systems of law, it is hardly necessary for us to stress the advisability of using the power to order a retrial with great circumspection, as indeed appears to have been the practice in the past.

We have been asked to quash the convictions in this case on the ground that the evidence was unsatisfactory by Maliki law and also on the ground that the defence of self-defence was neither investigated nor considered properly by the trial court, but in view of the decision we have arrived at on the power of the High Court in its appellate jurisdiction to order a retrial, we do not think it advisable to deal with these matters. After anxious consideration we have decided to remit this case to the High Court to consider, in the light of this judgment, the question of a retrial which that court was precluded from doing by reason of the previous decision of this Court

Case remitted to the High Court.

IBRAHIM OGENYI AND OTHERS *v* INSPECTOR-GENERAL OF POLICE

[C. A. (Bairamian S.P.J., and Smith J.) December 15, 1956]

[Jos—Criminal Appeal No. JD/103A/1956]

Criminal Law—Autrefois convict—Special plea raised before plea of not guilty—Treated as point of law after plea of not guilty—section 181 *Criminal Procedure Ordinance—Unlawful or riotous assembly—section* 69 *Criminal Code—Casual crowd misbehaving—Assaulting, resisting or obstructing a police officer —section* 356 (2) *Criminal Code—Count naming two policemen and other members of police force—Effect—Count bad for duplicity—sections* 152(1), 154(5)(*a*) *Criminal Procedure Ordinance.*

Northern Region High Court Law, 1955, *section* 47, *proviso.*

The appellants and others were charged with riot under section 71 of the Criminal Code. A second charge charged them with having "assaulted, resisted or wilfully obstructed Y.O. and A.O. and other members of the . . . . Police Force, who were acting in the execution of their duty", contrary to section 356 (2) of the Criminal Code. Before pleading to the charge they raised a point of *autrefois convict* but the magistrate said "as they were all represented by Counsel, he would raise points of law for them". Counsel said nothing then, but raised the point after a plea of not guilty had been entered; the magistrate permitted it and heard evidence, after which he ruled that a previous conviction had not been proved. It was argued on appeal that the trial of the plea of *autrefois convict* erased the plea of not guilty and, as the appellants were not asked to plead to the charge again, there was no plea to the charge and no trial.

The evidence was that people gathered out of interest in a meeting of family heads about a chieftaincy dispute—an occasion on which it is not unusual for people to gather together in party groups. Members of one group hooted at a member of another group and then threw stones at members of the other group who came over and, when the police intervened, they set upon the police. The magistrate took the view that the members of the first-mentioned group acted with a newly formed common and unlawful purpose, which made them guilty of riot, in spite of a submission on the law to the contrary. He also rejected a submission that

the second count was bad for duplicity in that (*a*) it alleged assault, resisting or obstructing the police in the alternative and (*b*) it named two policemen and other members of the police force. He examined the evidence and convicted the appellants, there being evidence against each that he assaulted, resisted or obstructed either one or the other of the two policemen named in the count or some other member of the force though not named in the count.

The point of duplicity was again raised in the appeal. It was suggested that an order for re-trial should be made, having regard to such an order having been made in the appeal of *Kasamu Dan Galadima v. Inspector-General of Police* (unreported). There was a long adjournment after the police had finished their evidence and the appellants had counsel from the start of the trial

Held: The special plea of *autrefois convict*, which the appellants, rightly, raised as a plea in bar of trial, ought to have been tried before their pleas to the charge were taken; but as the pleas of not guilty were not withdrawn, they remained on the record and were effective in spite of the subsequent trial of the plea of *autrefois convict* which was treated as a submission on a point of law.

Held also: It is only when persons assemble with intent to carry out some common purpose that they can be or become an unlawful or riotous assembly; if they gather without any such intent, they are a casual gathering and section 69 of the Criminal Code does not apply to them even though they misconduct themselves with a newly formed common purpose so long as they are the same original group that began as a casual gathering.

Held further:

(1) A count laid under section 356 (2) of the Criminal Code may, by virtue of section 154 (5) (*a*) of the Criminal Procedure Ordinance, allege assault, resistance or obstruction in the alternative; but as the said section 356 (2) speaks of "a police officer", the count must, in view of section 152 (1) of the Criminal Procedure Ordinance, specify the particular police officer who was assaulted, resisted or wilfully obstructed; consequently the 2nd count was inoperative as regards "other members" of the police force and was operative as a charge in relation only to the two policemen named.

(2) Where two or more persons are assaulted, the assault on each is a distinct offence and there ought to be a seperate count in respect of each person assaulted; the second count in this case was bad for duplicity in that it accused the appellants of assaulting two policemen.

(3) A conviction on a count which is bad for duplicity will not be set aside if the duplicity in the count did not occasion any substantial miscarriage of justice; there was a long interval between the evidence of the prosecution and the defence of the appellants, who had counsel from the start, and it could not be said that any one of them was prejudiced by the flaw in the count, and there was no reason to order a re-trial.

Cases referred to:

Edu v. Commissioner of Police, 14 W.A.C.A. 163 followed;

Amachree and others v. Newington, XX N.L.R. 13, 14 W.A.C.A. 97 followed;

Rex v. Thompson, (1914,) 2 K.B. 99 applied;

Ogbebor v. Commissioner of Police, 13 W.A.C.A 22 followed;

Kasemu Dan Galadima v. Inspector-General of Police, 8 October, 1956, on appeal in the High Court, (unreported) distinguished.

CRIMINAL APPEAL

Egbe, with him *Eso* and *Dabiri*, for the appellants.

Alcock, *Crown Counsel*, for the respondent.

Bairamian S.P.J. (delivering the judgment of the Court): The appellants with others were taken before the Magistrate on a charge under section 71 of the Criminal Code (riotous assembly) and another charge under section 356 (2) (assault, etc., of Police Officers), and before pleading to the charge they raised a point of *autrefois convict*. It was not dealt with at that stage; they pleaded to the charge, and, below their pleas of Not Guilty, the note reads:—

> "*Autrefois convict:* The accused raised this before plea individually but I pointed out that as they were all represented by Counsel, he would raise points of law for them. Counsel said nothing until after plea. However, I permit the point to be raised."

Thereafter the evidence of Mr Turner was taken, who had bound them over to keep the peace, without trial or conviction, whereupon the learned magistrate dicided that

the accused did not prove that they had been previously convicted.

In *Edu v Commissioner of Police*, 14 W.A.C.A. 163, it was said *obiter* that a defence under section 181 of the Criminal Procedure Ordinance that a person accused of an offence was not liable to be tried because of a former case ought to be pleaded in bar by that person himself before pleading not guilty. The appellants in this case took the right course, and their objection to being tried ought to have been treated as a plea in bar and heard before they pleaded to the charge itself.

It is admitted by learned Counsel for the appellants that the plea was bad in fact and in law, but the point he makes is this: that as the plea of *autrefois convict* was tried after the appellants pleaded not guilty, the trial of that plea wiped out the plea of not guilty; and, as the appellants were not asked to plead again to the charge, there was no plea of not guilty and therefore no trial.

There is on the record a plea of not guilty; there is no note on the record that leave was given to withdraw that plea in order to try the plea of *autrefois convict*. No authority has been cited for the proposition that if the plea of *autrefois convict* is treated as a submission on a point of law by counsel after a plea of not guilty, which was what happened in the court below, that then the plea of not guilty, though not withdrawn, is automatically wiped out. We are of the view that the plea of not guilty remained effective and that there was a trial.

At this point it is convenient to deal with the point whether the appellants were rightly convicted on the 1st count that they "riotously assembled together". Section 69 of the Criminal Code, which defines an unlawful assembly and a riotous one, begins with these words:—

> "When three or more persons, with intent to carry out some common purpose, assemble" etc.

Those words—"with intent to carry out some common purpose"—are the cornerstone of the section; they distinguish an assembly for the purposes of section 69 from a casual gathering of people who have come together in a place: e.g., if people come together beside a football field merely to watch a game, they are merely a casual crowd. If a casual crowd start a fight, it is merely a sudden affray; four or five or ten of them may attack some others; that does not make them an unlawful assembly or a riotous assembly for the reason

Ogenyi and others v. I.G.P.

Bairamian, S.P.J.

that when they gathered they did not do so with the intent to carry out some common purpose.

There is a good deal of confusion of thought owing to the provision that, though the original assembling was lawful, the assembly may become an unlawful assembly later if they conduct themselves with a common purpose in such a manner as is described in the section. That merely means that people who assemble peacefully or for a peaceful purpose may become an unlawful assembly later; but the paramount point remains that in assembling to begin with they assembled with intent to carry out some common purpose.

There is a case in which a casual gathering may give birth to an unlawful assembly, and that is when a dispute arises and they then break apart into groups with the intent to carry out a common purpose, that is to confront each other as groups: when persons move apart from a casual gathering in order to collect together as a separate body with the intent to carry out a common purpose, then, in that process of collecting, they are assembling with intent to carry out a common purpose and by their conduct may be or become an unlawful assembly.

These observations will have cleared the ground for considering this case: unless the appellants were persons who assembled together with intent to carry out a common purpose, section 69 does not apply to the case. In the words of the learned magistrate in his ruling "A crowd may collect sheep-like and without any real common purpose except perhaps of all standing together to watch something". They are a casual crowd. On the occasion in question people gathered out of interest in the meeting of family heads in the Council Hall about the chieftaincy dispute, and, as he says, "on these occasions in this country it is not unusual for people to gather together in party groups". Thus on his own view, the fact that members of the Northern Peoples Congress gathered in one group on that occasion did not mean that they assembled "with intent to carry out some common purpose"; therefore section 69 did not apply.

The section might have applied if the learned magistrate had made a finding of fact that some persons, including the appellants, out of the casual crowd moved apart as a freshly assembling group animated with the wish to carry out some common purpose, viz, that of making a concerted attack on the policemen; but he did not make any such finding of fact; what he said in his judgment was:

"Members of the Northern Peoples Congress were gathered in one place and they hooted at a leading member of the Igbirra Tribal Union who was passing. This annoyed some of the younger members of the Igbirra Tribal Union who came over to them and some of the Northern Peoples Congress group threw stones at Igbirra Tribal Union..... When the police who were present saw the Northern Peoples Congress group throwing stones they went to intervene. There they were set upon by those present."

The Northern Peoples Congress group may have acted badly; they may have acted with a newly formed common and unlawful purpose; but they were still the same original group that began as a casual crowd. Therefore they were wrongly convicted on a count that they "riotously assembled together".

The second count states that the appellants (and the others who were on trial with them)—

"assaulted, resisted, or wilfully obstructed Yesufu Onuya and Amadu Okene and other members of the Igbirra Native Authority Police Force, who were acting in the execution of their duty and thereby committed an offence contrary to section 356 (2) of the Criminal Code."

Section 356 (2) reads thus:—

"Any person who—.....

(2) assaults, resists, or wilfully obstructs a police officer while acting in the execution of his duty, or any person acting in aid of a police officer while so acting.....

is guilty of a felony, and is liable to imprisonment for three years."

There is no model in the Schedule to the Criminal Procedure Ordinance for a charge under that section. Archbold (1954, at page 1039) gives this model for particulars of the offence:—

"A.B., on the—day of—, in the county of—, assaulted (resisted, or wilfully obstructed) J.N., a police constable, in the due execution of his duty."

The model contemplates that the particulars in a count shall be either 'assaulted' or 'resisted' or 'wilfully obstructed' but not all three together; that is for England. In Nigeria, however, there is the provision in section 154 (5) (*a*) of the Criminal Procedure Ordinance, which provides that:—

"(5) (*a*) Where a written law constituting an offence states the offence to be the omission to do any one of the

Ogenyi and others v I.G.P. Bairamian, S.P.J.

different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of any different intentions, or states any part of the offence in the alternative, the acts, omission, capacities, or intentions, or other matters stated in the alternative in the written law, may be stated in the alternative in the charge."

We therefore think that in Nigeria there is nothing wrong in a charge which includes "assaulted, resisted, or wilfully obstructed" in the alternative.

We do think, however, that it was a mistake to write in count 2 "Yesufu Onuya and Amadu Okene and other members of the Igbirra Native Authority Police Force".

The words "other members of the Igbirra Native Authority Police Force" are vague; they sin against the rule that a charge shall give sufficient information as to the person against whom the alleged offence was committed: section 152 (1) of the Criminal Procedure Ordinance. The particular policemen who are assaulted or resisted or wilfully obstructed must be named. We are therefore bound to regard the words "other members" as inoperative and to rule that the charge in the second count was operative as a charge only in relation to the two policemen named—Yesufu Onuya and Amadu Okene. The wording of section 356 (2) is "a police officer", that is to say a particular police officer, not the police in general.

Even so the second count remains bad for duplicity in that it names two policemen: there should have been two separate counts—one in relation to Yesufu Onuya and another in relation to Amadu Okene. The assault on each was a separate and distinct assault. If they had wished to sue for damages for assault, each would have had to bring a separate suit, for in respect of each the cause of action was distinct and separate: *Amachree and others v Newington*, XX N.L.R. 13, and on appeal in 14 W.A.C.A. 97.

When a count is bad for duplicity the question arises whether the conviction should be set aside with an acquittal or an order for re-trial, or be allowed to stand. It may be allowed to stand if the duplicity in the count did not occasion any "substantial miscarriage of justice": proviso to section 47 of the Northern Region High Court Law, 1955. That was taken from section 11 of the West African Court of Appeal Ordinance (1948 Laws, Cap. 229) which was taken from section 4 (1) of the Criminal Appeal Act, 1907. The case of *Rex v Thompson* (1914) 2 K.B. 99, which relates to counts which

were faulty on the ground of duplicity and the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, is therefore apposite; it was relied upon in *Daniel Ojo Ogbebor v Commissioner of Police*, 13 W.A.C.A. 22, a case tried by a magistrate. It will be relied upon here.

Thompson was convicted on a count charging him with having carnal knowledge of a girl (his own daughter) "on divers days between the month of January, 1909, and the 4th day of October, 1910", and on another count with having committed offences "on divers days between the 4th day of October, 1910, and the end of February, 1913". He appealed on the ground that the indictment was bad for duplicity, or, in other words, that more than one offence was charged in each of the counts. The judgment states:—

> "At the hearing before this Court it was not, and indeed it could not be, disputed that the appellant had not thereby suffered any embarrassment or prejudice at the trial, inasmuch as in the depositions and during the trial offences were proved on specific dates of which the appellant had had ample notice, and for which the defence was fully prepared."

In the present case the evidence of the prosecution witnesses who spoke to the events of the 7th January, 1956, was concluded on the 13th June, 1956, and on that day the learned Magistrate discharged Accused 20 without argument because there was no evidence against him. There followed a submission by the defence on the law of riot, and another submission that the second count was bad for duplicity and the accused could not tell which of them was charged with assault on which member of the police force, or whether he was charged with obstruction or resistance: the purpose of the charge, it was argued, was to show the offence on which the accused was to stand trial.

An objection on the ground of duplicity was also made at the trial of *Rex v Thompson* but it was overruled. In the present case the learned magistrate adjourned to the 14th August, 1956, gave a ruling against the defence and proceeded with the trial. That was two months after the adjournment.

It seems to us that that interval afforded each one of the accused, who had heard the evidence against him, ample time to consider and prepare for his defence. The accused had learned Counsel from the start of the case who knew the evidence against each one of the appellants. We do not think it can be said with any show of reason that any appellant was

Ogenyi and others v I.G.P. Bairamian, S.P.J.

embarrassed or prejudiced by the flaw in the second count when called upon to make his defence.

Here we must observe, as we have done already, that the second count was inoperative in so far as it alleged assault of "other members" of the Police Force who were not named; and any conviction on the ground of assaulting someone other than the two policemen named must be set aside on the ground that no defendant was on trial for assault on any other policeman under the second count as framed. No order will be made for re-trial in any such case, for the reason that on the charge before the court no defendant can be tried for the assault of any other policeman. We cannot amend a charge on appeal. Consequently we must acquit on the second count in any such case as aforesaid.

It was suggested that we should order a re-trial of the appellants because of the duplicity in the second count, following the course taken by this Court in the appeal of *Kasemu Dan Galadima v Inspector-General of Police* on 8 October, 1956. The count on which he was convicted charged him and 13 others with assaulting three persons on a certain day; the argument for the appellant was that the count was bad for duplicity: the evidence (it was argued, and truly so) was that the assaults were not committed at the same time: one person was assaulted first, then the appellant and his companions went away and came back and assaulted the other two persons. There was thus a multiple duplicity, so to speak, which might have embarrased the defendants, who, by the way, were not represented by counsel. The present case is distinguishable. We do not think that the present appellants were hampered in their defence: we mean of course in so far as they were on trial for assaulting the two policemen named in the count. We see no reason for ordering a re-trial in this case.

The learned Magistrate dealt with the evidence against each one of the appellants; we make use of his findings:—

Appellant 1: Ibrahim Ogenyi: Accused 1: he was found guilty of assaulting Yesufu Onuya, P.W.5, who is named in count 2; his conviction and sentence on count 2 are affirmed;

Appellant 2: Ali Arigi: Accused 2: he was found guilty of assaulting Amadu Okene, P.W.4, who is named in count 2; his conviction and sentence on count 2 are affirmed;

Appellant 3: Isa Obaino: Accused 3: he was found guilty of committing acts of assault, but it is not stated

in the finding that it was on either of the policemen named in the second count; his conviction and sentence are set aside, and he is acquitted on the count:

Appellant 4: Yesufu Odende: Accused 4: he was found guilty of assaulting Yesufu Onuya, one of the policemen named in the second count; his conviction and sentence on the second count are affirmed.

Appellant 5: Uyeyanori Uche: Accused 5: he was found guilty of assault on P.W.5, Yesufu Onuya; his conviction and sentence are affirmed on count 2.

Appellant 6: Bello Isa: Accused 6: he was found guilty of assault on P.W.5, Yesufu Onuya; his conviction and sentence on count 2 are affirmed;

Appellant 7: Audu Okomoye: Accused 13: he was found guilty of resisting early in the proceedings at a time, the learned Magistrate says, when the intention to riot may not have been formed. P.W.3, Andrew Amako, not a person named in the second count, said that he arrested Accused 13 for throwing stones and that the Accused resisted and finally escaped with the help of Accused 4. The finding does not state at whom Accused 13 was throwing stones, so that he may thereby be deemed to have committed assault under the definition in section 252 of the Criminal Code. His resisting Andrew Amako cannot support a conviction under count 2 as framed, and the conviction and sentence are set aside;

Appellant 8: Adamsa Onoma: Accused 15: he was found guilty of assaulting Amadu Okene, P.W.4; his conviction and sentence on count 2 are affirmed;

Appellant 9: Alhaji Abdulsami Ogweye: Accused 17: P.W.8 and P.W.10 say that Accused 17 rescued an accused person from P.W.8 and tried to rescue another from P.W.10. P.W.8 is not mentioned in count 2, nor is P.W.10; they are Audu Odaiza and Jimoh Maliki. The conviction and sentence of Appellant 9 on count 2 are set aside;

Appellant 10: Onemisi Ichimiri: Accused 21:

Appellant 11: Amadu Chogudo: Accused 22:

These two are dealt with together in the findings. P.W.7 saw Accused 22 throw a stone "at the boys" and arrested him. P.W.11 said he saw him throw a stone at the police and arrested him. P.W.8 saw him throwing stones at the police and arrested him.

Throwing stones at the police is too vague to sustain a conviction of assaulting under count 2, which is operative only in relation to the two policemen Yesufu Onuya and Amadu Okene. The conviction of Appellant 11 is set aside with the sentence on count 2;

Appellant 10 was testified against by P.W.7 and P.W.8; apparently he was found guilty on count 2 on the ground that he took part "in the matter".

His conviction cannot be sustained; it is set aside with the sentence on count 2.

All convictions and sentences on count 1 are set aside and a verdict of acquittal entered. On count 2 those of appellants 3, 7, 9, 10 and 11 are set aside and they are acquitted of the charge in count 2, whilst the convictions and sentences of appellants 1, 2, 4, 5, 6, and 8 on count 2 are affirmed and they are committed to custody to serve their terms.

Appeal allowed in the case of some appellants and dismissed in the case of the others.

JOHN DURU *v* GUMEL NATIVE AUTHORITY

[C. A. (Sir Algernon Brown C. J., Smith J. Assessors: Mallam Abubakar, Chief Alkali of Gwandu, Mallam Abdullahi, Chief Alkali of Kontagora.)—April 4, 1957]

[Kano—Criminal Appeal No. K/7A/1957]

Moslem law—Stealing—No evidence of eye witness to the act—Mere suspicion—Oath proffered to complainant—Whether correct procedure—Articles found during trial in property of accused—Alkali convicting and passing sentence in respect of those articles—Need for complainant.

The appellant was brought before the Alkali of Gumel on a complaint brought by his employer that he had stolen £300 from him and that the reason for his suspicion was based upon what was said to him by one Isa. The evidence of Isa was that he looked through the window of the room where the money was kept and saw the appellant touching the money. He taxed him with this, he at first made no reply but then later asked the witness what business it was of his. That was the evidence.

Upon hearing this evidence, the Alkali asked the complainant "if he has got a second witness who would complete the witness of theft" on the appellant. The complainant replied that he had no further witnesses, and the Alkali thereupon called upon him to take an oath and he did so, swearing that "Isa's witness is true and that John stole his money £300".

The defence was a complete denial, and the appellant objected to the oath being taken by the complainant. The court however ordered him to repay £300.

During the trial of this question, the police suggested that the appellant had also stolen three basins the property of one Indi. The Alkali ordered a search of the property of the appellant and the basins were found. The owner of the basins never came forward, nor did she make any complaint to the court. Although the appellant denied that the basins were stolen, the Alkali, upon the evidence before him, imprisoned him for one month.

Held: That there must be a complainant before the Court, and that to proceed with a case without a complainant renders the trial null and void;

Duru
v.
Gumel N.A.
Smith, J.

Held also:

(1) In relation to the theft of money, such evidence as there was consisted of the statement of the complainant that he suspected the appellant had stolen his money, which suspicion was based upon the evidence of a sole witness who had seen the appellant under suspicious circumstances;

(2) that the witness was not an eye witness to the theft, his evidence could not be accepted as proof, and its effect was the same as if no witness had been called to support the complaint;

(3) The Alkali ought to have proceeded as though no evidence had been heard, and as the appellant was not a reputed thief, he should have been asked to take an oath that he did not steal the money;

(4) that the Alkali had erred in applying procedure which was appropriate to another class of case and the conviction must be quashed.

Obiter: Had the evidence of the witness been that of an eyewitness to the theft, and had it been accepted by the court, then it would have been proper for the Alkali to have called upon the complainant, as the owner, to take an oath that it was the appellant who had stolen his money;

But in this case, where the appellant was not a reputed thief, if the oath had been offered to him and he had taken it, he would have established his innocence;

Or the appellant could have challenged the owner of the money to take an oath and had the owner accepted that challenge, then the appellant would have had to pay the money;

But had the appellant been a reputed thief, it would have been proper for the Alkali to have called upon the complainant to take an oath that the appellant was the only person who could have stolen his money. And this oath would then have furnished the confirmation required before the court could make an order for the repayment of the money. A reputed thief is never asked to take an oath.

Also the fact that the appellant was not a Moslem did not affect the procedure. He would have been asked to take the oath according to his own faith.

Cases referred to:

Umaru Mafindi v. Bauchi Native Authority, 1956 N.R.N.L.R. 41 followed.

CRIMINAL APPEAL

The appellant in person.

McLean, Crown Counsel, for the Native Authority.

Smith J. (delivering the judgment of the Court): We allowed this appeal on 4th April and intimated that we would give our reasons later.

The appellant was charged before the Alkali of Gumel with stealing £300 the property of one Hani and was convicted of stealing three basins the property of one Indi. The Alkali also made an order requiring the appellant to pay £300, the sum alleged to have been stolen.

During the trial for the theft of the £300 the alkali ordered the police to make a further investigation as there was insufficient evidence to support this complaint. During the investigation the police discovered among the chattels of the appellant, three basins, which were alleged to be the property of Indi. The appellant said these basins belonged to him. Two witnesses, Namedi and Jibir, identified the basins as belonging to Indi. The alkali then ordered them to be taken to Indi for identification and it appears that he received a report that Indi identified them as hers.

At no time did Indi appear before the court to make a complaint that her basins had disappeared nor to identify, as her property, the three basins found among the appellant's chattels. There was thus no complainant before the court who alleged that these basins were stolen. We are advised by our assessors that the Alkali of Gumel erred in trying the appellant for the theft of the basins in the absence of a complainant who should have come before the court to allege this theft. On this point our assessors confirm the advice given to this Court by other assessors in *Umaru Mafindi v Bauchi Native Authority*, 1956 N.R.N.L.R. 41, where it was held that under Moslem Law there must be a complainant who makes a complaint before the court and that to proceed with a case without a complainant renders the trial null and void. For these reasons we quashed the conviction and sentence by the Alkali of Gumel for the theft of the basins.

The alkali also made an order for the payment by the appellant of £300. He realised that there was insufficient evidence to convict the appellant of the theft of the £300 belonging to Hani. Such evidence as there was consisted of

Duru
v
Gumel N.A.
Smith, J.

the statement of Hani that he suspected the appellant had stolen the money because Isa told him he saw the appellant touching the sack which contained the money in the room where the money was kept. Isa also gave evidence to this effect, which the appellant denied. The alkali, after pointing out that there was only one witness and a second witness was necessary to complete the proof, called upon Hani to take an oath that the appellant stole his money. This he did; and the alkali then made the order for the apyment of the £300. We are advised by our assessors that the alkali erred in calling upon Hani to take an oath.

The evidence of Isa merely disclosed that he had seen the appellant under suspicious circumstances. But the alkali appears to have considered Isa as an eyewitness to the act of stealing. Had Isa in fact been an eyewitness of the actual theft and his evidence been accepted, it would have been proper for the alkali to have called on Hani, as the owner, to take an oath to the effect that the appellant was the person who stole his money. This oath would have provided the confirmation required to enable the alkali to make an order for the payment of the money by the appellant.

But Isa was not an eyewitness of the actual theft. His evidence, we are advised, could not be accepted as proof and its effect was the same as if no witness had been called to support the complaint.

The alkali should have proceeded as if no witness had given evidence. The appellant, who was not a reputed thief but a person whose character was not known to the court, should have been asked to take an oath that he did not steal the money. Had the oath been profferred to him and had he taken it he would have established his innocence. Or the appellant, instead of taking the oath, could have challenged the owner to swear that the appellant had stolen the money. If the owner accepted the challenge, then an order for payment would be made. The fact that the appellant was a non-Moslem did not affect the procedure. He would have been asked to take the oath according to his own faith.

Had the appellant been a reputed thief it would have been proper for the alkali to have asked Hani to take an oath that the appellant was the only person who could possibly have stolen his money. This oath would have furnished the confirmation required to enable the court to make an order for the payment of the sum stolen. A reputed thief, because of his bad character, is never asked to take an oath.

The alkali erred in applying a procedure which was appropriate to a case where there is one male eyewitness to the act of stealing whose evidence is accepted, and also appropriate to a case where there is no eyewitness and the accused is a reputed thief, instead of applying the procedure appropriate to the case before him, which was to call upon the appellant to take an oath that he did not steal the money.

For these reasons we quashed the order for the payment of £300.

Appeal allowed.
Conviction and order quashed.

YAKUBU BAUCHI *v* BAUCHI NATIVE AUTHORITY

[C. A. (Bairamian S.P.J., Smith J. Assessors: Mallam Musa, Chief Alkali of Bida Alhaji Ibrahim Madabo, Babban Malami, Kano.)—December 11, 1956]

[Criminal Appeal—Jos—No. JD/102A/1956]

Moslem Law—Charge of abusing Alkalis generally—Case tried by Chief Alkali—Proper forum in such a case—Procedure—Denial by defendant—Witnesses for complainant not called.

The appellant was brought before the Chief Alkali of Bauchi for abusing for the proceedings of native courts, in the course of a public lecture. At the trial, the record of which showed traces of animosity between the Chief Alkali and the defendant, he denied the offence alleged against him. The Chief Alkali then proceeded to question the defendant further. The defendant was convicted and sentenced to twelve months' imprisonment.

Held: The primary mistake in the trial was that the proceedings were before the Chief Alkali when the charge was one of abusing alkalis; there must be a re-trial before the court of the Emir;

Held also: The Chief Alkali in view of the denial made by the appellant ought to have asked the complainant to produce his witnesses, before asking the appellant anything further.

CRIMINAL APPEAL

Appellant in person.

Alcock, *Crown Counsel*, for the Native Authority.

Bairamian S.P.J. (delivering the judgment of the Court): The N.A. policeman Sule Darazo brought a charge against the appellant in the Court of the Chief Alkali of Bauchi for abusing the proceedings taken in native courts while giving a lecture in the Bauchi market. The appellant said "I did not". Sule said that while lecturing the appellant stated that some of the alkalai were not trying cases as God ordained; they were just carrying books to the Court, giving passages of the Koran, but they were not using it.

The Chief Alkali ought, in view of the denial of the charge by the appellant, to have asked Sule to produce his witnesses in support of the accusation, before asking the

appellant anything further; but he did not do so. Instead of that, he asked the appellant, Is that so? And the record goes on to state that the appellant said "Yes, it is so".

The appellant denies before us that he said those words; he complains that his witnesses were not called, and that the Alkali punished him on the statement of the complainant. He asks us to re-hear the proceedings.

The remainder of the record shows traces of animosity in a discussion between the chief alkali and the appellant on what business it was of his to criticise proceedings in the alkalis' courts and abuse them in his lecture; and the upshot was a year's imprisonment, with a remark from the appellant, according to the record, which was unfortunate.

The primary mistake in the trial was that it was taken by the Chief Alkali, as the charge was abuse of the alkalis. We are advised by our learned assessors that the proper course is to order a re-trial before the Emir's Court. It is of paramount importance that an accused person should feel that he is having a fair trial, and this feeling it is not easy for him to have if the Court which tries him can be said to be court by implication, if not directly.

The appeal is allowed; the decision is set aside; and an order is made for re-trial on the same charge before the Court of the Emir of Bauchi.

Appeal allowed.
Order of re-trial.

J. OLAT MAJIYAGBE *v* ATTORNEY-GENERAL AND OTHERS

[High Court (Bairamian S.P.J.)—February 23, 1957]

[Jos—Petition of Right—JD/19/1956]

Land and Native Right Ordinance (*Cap.* 105)—*Right of occupancy for a term of years—Nature of such right—Certificate of occupancy containing proviso for re-entry—Proviso similar to proviso in a lease—Revocation of grant under section* 12 (*a*) *of the Ordinance—Mode of revocation—Signification—Section* 47 (2) (*a*) *Interpretation Ordinance* (*Cap.* 94—*Re-entry under proviso.*

Landlord and tenant—Lease—Proviso or re-entry—Determination of lease under that proviso.

The suppliant was in possession of a certificate of occupancy showing a grant for a specific term of years. One condition of the certificate was that he should pay a certain yearly rent in advance without demand; another made it lawful for the Governor to re-enter if the rent was in arrear, which is the customary proviso for re-entry contained in leases.

The suppliant was in arrear with payment of his rent, and the Governor wrote a note in a file in these words "revocation approved". An officer in the Plateau Provincial Office, signing on behalf of the Resident, informed the suppliant by letter that the Governor had approved revocation. These letters were in evidence. The note in the file was not, but was referred to by Counsel for the Attorney-General.

It was thought that the suppliant's grant had been determined and the plot was put up for auction and sold to a person who was joined as a party in the case.

It emerged during the hearing of the case, that half of the plot in the occupancy of the suppliant had previously been sold to satisfy a judgment, and although the proceeds had been paid out no certificate of title had been given to the purchasers. They were joined as parties to the case.

It was contended for the Attorney-General that the revocation was lawful and further that the Governor was entitled to re-enter the plot in accordance with the proviso in the certificate of occupancy, although, in fact, the suppliant had never given up possession nor had the Government used for recovery of possession.

Held: If the right of occupancy was revoked under section 12 (*a*) Land and Native Rights Ordinance, the revocation was a statutory act which could not, in view of section 47 (2) (*a*) Interpretation Ordinance, be signified by an officer writing on behalf of the Resident; consequently there was no evidence that the suppliant's right had been revoked;

Held also:

(1) The grant to the suppliant was in substance a lease and the proviso for re-entry in his certificate of occupancy was the usual proviso in a lease; therefore the question whether the grant had been determined under the proviso fell to be determined under the law appertaining to leases;

(2) In order to determine a lease under such a proviso there must be either an actual re-entry or an action for recovery of possession; therefore, as neither was present in this case, the suppliant's right had not been determined under the proviso;

Held further: As the suppliant's right of occupancy had not been determined, it was still in force, and the sale of his plot must be a nullity;

Obiter: "Revocation approved" as minuted by the Governor in the file, means an approval which must be carried into effect by some act to be done; a suitable method of revoking a right of occupancy and the certificate thereof would be by formal instrument of revocation.

Cases referred to:

Moore v Ullcoats Mining Co. (1908) 1 Ch. 575 followed;
Serjeant v Nash, Field and Co. (1903) 2 K.B. 304 followed;
Davenport v The Queen (1877) 3 Appeal Cases 115.

PETITION OF RIGHT

Suppliant in person.

Anionwu for the Attorney-General.

Young A. Ipeh, an added party, in person.

Rickett and *Dabiri* appeared for other added parties.

Bairamian S.P.J: This is a petition of right in which the suppliant in the belief that an order has been made revoking his certificate of occupancy makes a request "for the Governor to rescind the order" and allow him to continue the remnant of 14 years.

The certificate is No. 5253 of 15 January 1951, issued under section 17 of the Land and Native Rights Ordinance under the hand of the Chief Commissioner of the day and

Majiyagbe v Attorney-General and others

Bairamian, S.P.J.

registered in the Lands Registry Office at Kaduna; it relates to plot K. 2 at Jos shown on a drawing; it certifies that the suppliant is entitled to a right of occupancy for a term of 21 years from 8th February, 1950, on sundry conditions of which one is to pay rent in advance on 1st January, without demand; and there are other conditions, such as to build etc. In substance it is a lease, and it has the proviso for re-entry usual in leases to the effect that if the rent is in arrear or any part of it "whether the same shall or shall not have been legally demanded" (a customary provision)—

> "it shall be lawful for the Governor at any time thereafter into and upon the said land, or at any part thereof in the name of the whole, to re-enter and the same to have again, repossess and enjoy as in his former estate".

The suppliant is poor. In October, 1951, half his plot was brought at auction under a judgment; with that I shall deal later. In 1952 and in 1954 he was sued by Government for arrears of rent; in the second case there was judgment for £129 rent for two years, and an order to pay £32 5*s* 0*d* per month from October the 1st onwards. In February, 1955, a writ was taken out to recover a balance of £96 odd; it came back in June with a return of no assets. In March he paid £45, in June £21 15*s* 0*d* and also the rent for 1955 leaving a balance of £30 for 1954. On 30 September he overheard a conversation on the telephone in the office of the Local Authority of Jos, from which he gathered that his occupancy had been revoked on the 29th. According to his evidence he had sent a letter earlier that day (the 30th) to Kaduna enclosing the £30; and his receipt for it he says is dated the 13th October. He wrote a letter dated 30th September to Crown Counsel with a copy to the Resident to say that he had paid all the rent. He received a letter dated 10th October from the Provincial Office of Jos saying—

> "I have the honour to inform you that His Excellency has revoked Certificate of Occupancy No. 5253 held by you as from the 29th September, 1955.
>
> The improvements on the plot will be sold by auction and the proceeds handed over to you less the amount owing to Government, which is now £35 12*s* 6*d*. This figure is the £51 15*s* 0*d* for outstanding rent for 1954 less the rent paid on the remaining three months of this year, i.e., £16 2*s* 6*d*.
>
> I have the honour (etc.)
> (*Sgd.*) (? initials) Healy
> f—Resident, Plateau Province."

That gentleman wrote again on November 4 correcting the figures to show that there was no balance due from the suppliant and adding that—

> "The notice of payment of these amounts was not received until after His Excellency had approved revocation. I am therefore to inform you that £16 2*s* 6*d* will be refunded to you."

He was sent a voucher, but he refused to cash it. He was later asked to quit in April, 1956, but there is no suggestion that he did; and from the evidence of Justus Adenego, who said that he was brewing and selling liquor on the plot, I infer that the suppliant is still in possession. It was thought, however, that the plot could be sold by Government; there was an auction on 26 May, 1956, and Mr Ipeh bid and was the buyer.

Paragraph 5 of the defence for the Attorney-General states that the certificate of occupancy "was lawfully revoked with effect from 29th September, 1955". In his closing address Mr Anionwu, who appears for him, referred me to the bottom of page 65 of a Government file to see that revocation was approved; he did so in the belief that the whole file was in evidence as exhibit ZA.

My note (in cross-examination) reads—

> "This is a letter from me (viz., the suppliant) of 30-9-55 to Treasurer. ZA."

That is page 69 of the file; it is only that page which is in evidence. Moreover, a note in a Government file can only be an intimation to his officers by the Governor; it cannot be regarded as a signification of an act, or of an approval to an act, to a member of the public. So far as the suppliant is concerned, whether it be that "His Excellency has revoked", or "approved revocation" of, the certificate, the signification of it to the suppliant was by an officer addressing him in letters signed on behalf of the Resident.

There is some difference between saying that His Excellency "has revoked" and saying that he has "approved revocation"; the former means an act which did revoke, the latter an approval which would have to be carried into effect by some act to be done. In either case there is the question of how a certificate of occupancy granted in solemn form under section 17 of the Ordinance is to be revoked under section 12, and the further question of how the revocation by the Governor is to be signified to the grantee.

Majiyagbe v. Attorney-General and others

Bairamian, S.P.J.

On the first question I suggest that a statutory act revoking a right of occupancy, which is a grant of property, might without impropriety be done in solemn form. As the certificate of occupancy is registered as an instrument in the Lands Registry Office, some document of revocation which could be registered there as an instrument would not be out of place.

On the second question I think that the statutory act revoking a grant, whether an order or an approval or anything else, must, in view of section 47 (2) (*a*) of the Interpretation Ordinance, be signified—

> "in the case of the Governor of the Northern Region, under the hand of the Civil Secretary of the Northern Region, of the Administrative Secretary of the Northern Region or of the Secretary to the Governor and to the Executive Council of the Northern Region, or of the Deputy Secretary to the Executive Council of the Northern Region";

it could not have been signified by an officer in the Provincial Office of Jos, if there was one.

Thus the defence that the certificate of occupancy was lawfully revoked cannot be sustained by any evidence in the case; and the request of the suppliant "for the Governor to rescind the order" does not arise, there being no evidence that any order was made.

Mr Anionwu also relied on Clause 2 (3) of the certificate, which made it lawful for the Governor to re-enter on the plot as rent was in arrear and a cause of forfeiture had accrued. I agree with him on several points: the suppliant had been remiss in paying his rent; he was obviously poor; at the end of September, 1955, there was still rent due which should have been paid by April, 1954, at the latest; there was a clear cause of forfeiture of old standing which made it lawful to re-enter, and the terms stated in the letter from the Provincial Office of Jos were fair. Be it added that the proviso for re-entry in Clause 2 (3) for non-payment of rent was a valid condition to annex to the grant and a fair one; it is in terms similar to those of a proviso in a lease.

What a lessor does under the proviso is to give notice to quit and ask the lessee to surrender possession so that the lessor may re-enter; and if the lessee does not agree to do so, the lessor then brings what used to be called a suit in ejectment and is now called an action for recovery of possession. It is stated by the learned authors of Woodfall's Landlord and Tenant (1954) at the top of page 984, that—

"For the lease to determine upon such a proviso the lessor must either actually enter, or issue and serve a writ for recovery of possession, which is in law equivalent to re-entry."

The proposition is founded on *Moore v Ullcoats Mining Co.* (1908) 1 Ch. 575; reference is also made to *Serjeant v Nash, Field and Co.* (1903) 2 K.B. 304. The provisos there were similar to the one we have here. Neither a notice that a lease has determined or a demand for possession has the effect of determining a lease under the terms of the proviso. When an action is brought to recover possession it is of course open to the lessee to ask for relief against forfeiture.

The case of *Davenport v The Queen* 1877, 3 Appeal Cases, 115, is a valuable guide. The dispute there related to a lease granted under colonial legislation. The Crown sued in ejectment upon a claim of forfeiture under the Act and lost on the ground that rent was accepted; the Privy Council applied the principle of waiver in the law of leases. It may be that case which prompted the provision in section 13 of our Ordinance.

The grant in this case is in substance a lease. What is invoked is a proviso for re-entry in the usual form found in leases. The question whether Government has re-entered on the plot falls to be determined by the law relating to such a proviso; and the answer is that there has been no re-entry. There is no suggestion that the suppliant has surrendered possession; and the evidence of Justus Adenego is that he brews and sells liquor on the plot. There has been no action to recover possession. It follows that the right of occupancy has not been terminated under the proviso in Clause 2 (3) of the Certificate of Occupancy.

The grant in my judgment endures and is in force, with of course all the consequences that follow whether as to the rights or as to the liabilities and obligations of the Suppliant. A declaration will be made accordingly.

As between Mr Majiyagbe and Mr Ipeh, the sale to the latter in May, 1956, was a nullity, and the latter is not entitled to possession of the plot.

[The learned Judge then proceeded to deal with the administrative aspects of his judgment.]

Declaration and decree in Suppliant's favour, with an order for sale by consent.

ELLIOT SAVILLE AND COMPANY *v* MALLAM IBRAHIM LANSARI AND OTHERS

[High Court (Smith J.) May 24, 1957]

[Kano—Interlocutory Matter—No. K/95/1956]

Practice and Procedure—Motion to strike out counterclaim under O. XXVI r. 4 (a) Supreme Court (Civil Procedure) Rules—Alternative claim for order under O. XXVI r. 3—Failure by defendant and his counsel to lodge counterclaim under rule—Proviso to O. XXVI r. 4—Discretion of court—Counsel for defendant pursuing counterclaim which defendant was prohibited from setting up—Whether mere irregularity.

The facts appear sufficiently from the judgment.

Held: "To file a counterclaim without notice and without the leave of the court is more than a mere irregularity. It is what the rule expressly says a defendant cannot do. It is implicit in the proviso that a defendant having failed to lodge the requisite notice must ask the court to exercise its discretion in his favour *before* he files a counterclaim. This has not been done and the counterclaim filed on 27th March is therefore struck out."

INTERLOCUTORY MATTER

Grey for the applicant.

Thomas for the respondent.

Smith, J. : Mr Grey, on behalf of the plaintiffs, moved the court for an order to strike out the first defendant's counterclaim on the ground that he has failed to comply with Order XXVI r. 4 (*a*) and, in the alternative, for an order under Order XXVI r. 3 to exclude the counterclaim. The writ of summons in this suit was served on the first defendant on 9th January 1957. The return-day in the writ was 29th January. On that day the court made an order for pleadings and pursuant to that order the statement of claim was filed on 28th February. Mr Thomas, for the first defendant, filed a statement of defence and counterclaim on 27th March. Mr Grey filed the motion to strike out the counterclaim on 15th April and his application was heard on 20th May.

Saville & Co. v. Lanasari andothers

Smith, J.

Order XXVI r. 4 (*a*) prohibits a defendant from filing a counterclaim "unless he shall have lodged with the registrar four clear days before the return-day a notice in original, and as many duplicates thereof as there are plaintiffs, containing his name and address and a concise statement of the grounds of such counterclaim . . . . and shall have paid the same court and service fees as would be payable if he were claiming by writ of summons". The proviso to this rule gives the court a discretion in the following terms:

> "Provided that the court may in its discretion, and on such terms as may seem just, allow the defendant to set up a counterclaim or set-off notwithstanding that such notice has not been duly lodged."

Neither the first defendant nor counsel on his behalf, lodged a notice of counterclaim under this rule. Mr Thomas submitted that, as he was not briefed before 26th January, he could not file a valid notice before the return-day, the 29th January. That is not disputed. But it was nevertheless his duty to remedy the omission at the first opportunity, which arose on 29th January when the order for pleadings was made. Mr Thomas said that it only became apparent that it would be necessary to file a counterclaim when he received the statement of claim. I am unable to accept this explanation because it is clear on the face of the writ that the plaintiffs' claim for a declaration that a certain sum of money held by Barclays Bank Kano is the property of the plaintiffs arose out of a contract between the parties for the sale and delivery by first defendant of five tons of kapok and the counterclaim is based on the same contract. I am, however, more concerned by the fact that, although Mr Thomas on his own admission realised the need for a counterclaim on or about 28th February, he made no attempt to apply to the court for the exercise of its discretion under the proviso to the rule. He kept silent on the matter for nearly four months and it was not until 20th May, when he was faced with having to reply to the motion that he made a verbal application under the proviso in the course of his reply. His application was not that the first defendant should be allowed to set up a counterclaim notwithstanding the fact that he had failed to lodge the requisite notice but that a counterclaim filed in contravention of the rule on 27th March should be allowed to stand.

The orders and rules of court must be adhered to. In appropriate cases the court may waive or amend an irregularity in procedure to ensure that substantial justice is done. An omission to lodge a notice under Rule 4 (*a*) may be rectified

by exercise of the proviso. But the first defendant has not only omitted to lodge a notice, but Mr Thomas, on his behalf, has purported to set up a counterclaim which in the circumstances he is prohibited from doing without the permission of the court. To file a counterclaim without notice and without the leave of the court is more than a mere irregularity. It is what the rule expressly says a defendant cannot do. It is implicit in the proviso that a defendant having failed to lodge the requisite notice must ask the court to exercise its discretion in his favour *before* he files a counterclaim.

This has not been done and the conterclaim filed on 27th March is therefore struck out.

It is unnecessary to consider the alternative application by Mr Grey to exclude the counterclaim under Order XXVI r. 3.

Application allowed.

TAFIDA DAN ISKA AND ANOTHER *v* ABDU DABI

[C.A. (Sir Algernon Brown C.J., Smith J.) (Assessors: Mallam Musa, Chief Alkali of Katagum, Mallam Ibrahim, Alkali of Wudil) June 14, 1957]

[Kano—Appeal from Native Court—No. K/60A/1957]

Moslem Law and Procedure—Distinction between Haddi and Siyasa offences—Complainant's witnesses unacceptable—Defendants called upon to swear on the Koran—Error as to procedure.

The appellants were brought before the Chief Alkali of Hadejia by the respondent, who alleged that they had called him a thief. Both appellants denied the allegation and the complainant was called upon to produce his witnesses. The appellants objected to both witnesses on account of their friendship for the complainant, and the witnesses having been found unacceptable, the Chief Alkali called upon the appellants "that they should swear by the Koran if they did not call Abdu Dabi a thief". Both the appellants refused to swear, and there was some suggestion that they later confessed to the Chief Alkali. They were thereupon sentenced to three months' imprisonment.

Held: That as this was a *siyasa* offence, the court made a fundamental error in calling upon the appellants to swear after the two witnesses for the complainant had been found unacceptable.

CRIMINAL APPEAL

McLean, Crown Counsel, as *amicus curiae*: Alkali has provided a statement of the gounds for his decision which reads as follows "The Court decide this case in accordance with the Moslem Law as indicated in Risalah and Tuhfa that everybody who falsely spoil somebody's name or call him a thief should be beaten eighty lashes". Submits that Alkali has fallen into error by confusing the two offences of *kazafi* and *cin mutunci*.

Kazafi consists in calling a person an unbeliever or imputing to him bastardy or fornication. It is an offence which involves slandering a person's religious morals. See section upon *kadhf* or slander at Ruxton page 333. See Ibn-Arfa's definition on that page. See also paragraphs 1964 and 1965. The punishment for this offence is shown in para-

graph 1967 to be the infliction of eighty lashes. This offence is also dealt with in the Risalah towards the end of the chapter on Blood and on Set Punishments, where allegations of fornication and buggery are to be punished with eighty lashes. This is a haddi punishment.

Cin mutunci on the other hand is dealt with in the Tabsira volume II where it is provided that 'If a man says to another, "You are a thief" then the punishment shall be according to the status of the complainant and the defendant, and shall be either fifteen lashes or else punishment according to the discretion of the judge'. This is a *ladabi* punishment, and the imprisonment would not normally exceed three months.

Would suggest that court had power under section 68 Native Courts Law to substitute a finding of *cin mutunci*.

Brown, C. J. (delivering the judgment of the Court): We are advised that this conviction cannot stand because the Chief Alkali made a fundamental error in calling upon the appellants to swear by the Koran after the complainant's two witnesses had been found to be unacceptable on account of their friendship with the complainant. This was a *Siyasa* offence. If it had been a *Haddi* offence, the procedure would have been correct. But as it was a *Siyasa* offence, it was fundamentally wrong, and nothing that occurred in the trial thereafter could put it right.

Learned Crown Counsel has put forward a suggestion which our Assessors think may well be correct. He thinks that the error may have been due to the Chief Alkali confusing the *Haddi* offence of *kazafi* with the *Siyasa* offence of *cin mutunci*. The former consists of calling a person an unbeliever, or accusing him of fornication, or alleging that he is a bastard; and its punishment is prescribed in the Koran. But that was not the offence which the Chief Alkali had before him. To call a person a thief without cause is to commit the *Siyasa* offence of "abusive language" or *cin mutunci*. It is punishable by way of *ladabi*. And if the evidence fails the accused cannot be called upon to take the oath—as he could be if he was accused of a Haddi offence.

On account of the error to which we have referred the conviction must be quashed and sentences of three months' imprisonment must be set aside.

Appeal allowed.

ABDULAI KOLADE JOSEPH *v* INSPECTOR-GENERAL OF POLICE

[C. A. (Sir Algernon Brown, C. J., Hurley J.) January 22, 1957]

[Ilorin—Criminal Appeal No. K/47A/56]

Taking part in an unlawful procession which takes place without a licence; section 38 (*a*) *Police Ordinance—Burden of proving the fact that no licence was issued.*

The appellant was convicted of taking part in an unlawful procession which took place without a licence contrary to section 38 (*a*) of the Police Ordinance, Cap 172. In his judgment, the learned magistrate said "there has been no suggestion throughout this case that there was a permit, and the burden of showing that there was lies on the accused, on the principle re-applied in *Police versus Otti*, 1956 N.R.L.R. 1." The only reference to a permit was that of a prosecution witness, Mr Fortingo, who said: "I turned out 50 members of the N.A. Police, as I found there was no permit for the procession".

Held:

(1) The learned magistrate misdirected himself in holding that it was for the accused to prove the existence of a licence;

(2) The burden which rested upon the prosecution of proving that there was no licence was discharged.

Cases referred to:

I.G.P. v Christopher Otti, 1956 N.R.N.L.R., distinguished.

CRIMINAL APPEAL

Kayode for the appellant. There must be direct evidence to prove that no licence was issued. By section 36 (2) the issue of licences is in the hands of the Police. This case is to be distinguished from Otti's case because there the authority who issues moneylenders' licences is not the Police, who were the complainants in the case. In Otti's case, the existence or non-existence of the licence was a matter which was within the peculiar knowledge of Otti. In the present case, if the convener of the procession had been charged, the issue of the licence would be within his peculiar knowledge, and Otti's case might apply; although even in the case of the convener I would say that

there would have to be legislation expressly shifting the burden of proof to him. But a person merely joining an unlawful procession is guilty, whether he knew that no licence existed or not; and the onus of proving the non-existence of a licence is on the prosecution, who alone have that knowledge. The witness's reference to the non-existence of a permit was made in order to explain why he stopped the procession, and was admissible only for that purpose. It was not admissible to establish the fact that there was no permit, because it was either hearsay or secondary evidence of a document.

[*Chief Justice:* How can you have secondary evidence of a non-existent document?]

If the witness had said "No permit has been issued", speaking from his personal knowledge, it would be evidence. But we do not know what sort of enquiries the witness made. What he said was not based on his personal knowledge, because he used the expression "I found".

McLean, Crown Counsel, for the respondent: I agree that in a charge of this nature the burden of proving the non-existence of the licence was upon the Police. The learned magistrate misdirected himself; and I agree that this case is to be distinguished from Otti's case. But there was no substantial miscarriage of justice, and the proviso to section 47 of the High Court Law is in point.

[*Chief Justice:* If the prosecution have failed to prove a fact which the law requires them to prove, it cannot be said that there is no substantial miscarriage of justice if the man is convicted.]

Yes, the question here is whether the required evidence exists. "I found" means that he saw no permit; that is to say, that a permit did not exist, and that he could not find it.

Kayode in reply: If the words "I found" mean ocular investigation, it is still not enough; the person charged with the issue of permits should have been called.

[*Chief Justice:* The witness Fortingo was the Assistant Superintendent of Police Adviser to the Native Authority Police.]

He could have said that his department never issued a permit, but he did not say that.

Brown C. J. (delivering the judgment of the Court): The appellant was convicted of two offences under section 38 of the Police Ordinance, of which the first was taking part in an unlawful assembly which took place without

Joseph v. I.G.P. Brown, C.J.

a licence. Mr Kayode agrees that the conviction upon the second charge must stand or fall by his argument on the first charge. In a careful judgment, the learned magistrate analysed the section and the ingredients which had to be proved. He first satisfied himself from the evidence that there was a procession. And he refers to the evidence of Mr Fortingo to the effect that it had no permit. But upon the question of whether the procession took place without a licence, he said that the burden of proof was upon the accused, and he relied upon the principle of *I.G.P. v Christopher Otti*, 1956 N.R.N.L.R. 1. Mr McLean concedes that he thereby misdirected himself. The principle in Otti's case applies where the existence of the licence is especially within the knowledge of the person who is alleged not to have the licence; and in such a case the burden of proving its existence is upon him. But in the present case, the appellant was charged with taking part in an unlawful procession, and it cannot be said that the existence or otherwise of a licence is a fact which was peculiarly within his knowledge. That fact is within the knowledge of the Police, who are charged with the duty of issuing licences, and the burden of proving the fact that there was no licence is upon them.

The question, therefore, is whether the Police have established the fact that there was no licence for this procession. Mr Fortingo says that he found there was no permit for the procession. That may mean that he made oral enquiries from third persons who informed him that there was no permit, or it may mean that he looked for some record of a permit and found none. His evidence as phrased would allow of either construction. But there was no cross-examination on the point, and it is not for this court to apply the first construction rather than the second. The witness was the Assistant Superintendent of Police advising the Native Authority Police, and as such would be answerable for what the Native Authority Police did in the matter of licences. He could only answer for that by enquiring from among the Native Authority Police and their records. There was no cross-examination on the point—for the very good reason that from the beginning of this case until the end no licence was suggested or thought of. Mr Fortingo's evidence as it stands affords evidence of the fact that there was no licence. In our opinion, the prosecution have discharged the burden which was upon them of proving the non-existence of the licence, and the appeal must be dismissed.

Appeal dismissed.

AKATU ONYIROKWU *v* INSPECTOR-GENERAL OF POLICE

[C.A. (Bairamian S.P.J. and Smith J.) December 15, 1956]

[Jos—Criminal Appeal No. JD/119A/1956]

Criminal Law—Criminal Code, section 126 (2)*—Aim of sub-section—Attempting to defeat course of justice—Acquittal in another case irrelevant—Begging prosecuting officer for help—Intention deducible from circumstances—Charge: "In order that he might hide the facts in the charges": meaning.*

The appellant was convicted under section 126 (2) of the Criminal Code of attempting to defeat the course of justice in that he "begged" the prosecuting officer "in order that he might hide the facts in the charges" against the appellant in another case pending for trial.

The appellant, who was president of a native court, saw the prosecuting officer and asked for his help, and was told that it was not that officer's custom to help accused persons. Nevertheless he went in the evening again to beg for help and said he had given the officer in charge of investigations money without fruit. The magistrate was of opinion that, though the "exact wording" of the count had not been proved, it was clear that the prosecuting officer "was, by act or default, so to conduct the prosecution that accused would be acquitted" in the other case.

It was argued for the appellant (1) that his begging for help did not prove that he wanted the prosecuting officer to do more than put the facts of the other case wholly before the court, and (2) that, as that officer did not say that he understood that the appellant wanted him to hide the facts of the case, there was no evidence that the appellant begged "in order that he might hide the facts in the charges". It was also stated that the appellant was acquitted in that case.

Held:

(1) The purpose of section 126 (2) of the Criminal Code is that the administration of justice must be left to take its proper course; the acquittal in the other case did not affect the prosecution under section 126 (2);

(2) it was for the court to decide from the circumstances what the intention was behind the begging, and the magistrate's inference was justified;

Onyirokwu v. I.G.P. — Bairamian, S.P.J.

(3) the statement in the count—"in order that he might hide the facts in the charges"—did not mean that those were the words used by the appellant in begging: it meant that that was the intention behind the begging; and the magistrate's finding was in substance to that effect.

Cases referred to:

Reg. v Marcellus, 20 N.L.R. 155, followed;

Hattab v I.G.P., 1956 N.R.N.L.R. 24, applied;

Sogbanmu v C.O.P., 12 W.A.C.A. 356, 357, applied.

(*Editor's Note.*—There was also another count of corruption based on the appellant's statement that he had given money to the officer in charge of investigations: the count was laid under s. 98 (2) of the Criminal Code, erroneously: see *Reg .v Marcellus* above; the conviction for that was set aside.)

CRIMINAL APPEAL

Eso for appellant.

Nunan, with him *Alcock*, *Crown Counsel*, for respondent.

Bairamian, S.P.J. (delivering the judgment of the Court):

The appellant was convicted on two counts—

(1) that in 1956 he did corruptly give to Sergeant Odama Ogboko the sum of £15 on account of offences committed by him under sections 104, 419, and 390 of the Criminal Code, contra section 98 (2);

and the other under section 126 (2) of the Criminal Code—

(2) "That you Akatu Onyirokwu, on the 30th July, 1956, at Oturkpo, in Idoma Division, in Benue Province, in the Jos Magisterial District, did attempt to defeat the course of justice to wit, begged Sergeant No. 7741 C. Chukwu of the Nigeria Police Force, in order that he might hide the facts in the charges against you, as mentioned above and thereby committed an offence punishable under section 126 (2) of the Criminal Code."

Section 126 (2) of the Criminal Code provides that—

"Any person who attempts, in any way not specially defined in this code, to obstruct, prevent, pervert, or defeat, the course of justice is guilty of a misdemeanour, and is liable to imprisonment for two years."

The learned magistrate wrote this in his judgment—

"The facts in this case are very clearly established. Accused, after two preliminary attempts, came to see

P.W. 1 and begged him to help accused in the prosecution of the offences then charged against accused. The exact wording of the second count has not been proved, but it is quite clear that accused begged P.W. 1, who is charged with the duties of general prosecutor before this court, to assist accused in the case. This can have but one meaning, namely that P.W. 1 was, by act or default, so to conduct the prosecution that accused would be acquitted. During the course of this begging, accused stated that he had already spent a lot of money on a man who had been no help to him. He named the man as Sergeant Ogboko, whose duty is to be in general charge of investigation of all matters which later come into the hands of P.W. 1 for prosecution. Clearly such a man is in a position to interfere with the due administration of justice by suppressing or toning down evidence and many other small things. . . . . I accept as substantially proved the facts put forward by the prosecution.

"A conviction on the 2nd count necessarily follows."

The amount of money which the appellant said he had paid Sergeant Ogboko, who was in charge of investigations, was £15. The appellant was convicted on both counts.

It is agreed by learned Crown Counsel that the conviction on the first count cannot stand because it is laid under section 98 (2), which was a mistake in view of the judgment in *Reg. v Marcellus*, 20 N.L.R. 155. The debate was whether the conviction on the 2nd count (quoted verbatim) was also wrong.

The appellant was president of the native court in Oturkpo; there were charges against him. On 30th July he went to see the prosecuting sergeant saying that he relied on the sergeant, being sure that the sergeant would help him; he was told by the sergeant that it was not his custom to help accused persons. The appellant went to see the sergeant again in the evening saying he had come to beg him for his help, and that he had given a lot of money to another sergeant who had failed to help him, namely £15; he was told by sergeant Chukwu to go and report to the District Officer and go to get his money back. On that evidence learned counsel for the appellant has argued (1) that the fact that the appellant begged the prosecuting sergeant for help does not prove that he wanted the sergeant to do more than put the facts of the case wholly before the court; and (2) that there was no evidence that he begged "in order that he (the sergeant) might hide the facts in the charges against you", as stated in

Onyirokwu v I.G.P. Bairamian, S.P.J.

the 2nd count, the sergeant not having said that he understood that this was the appellant's intention in begging for his help.

It was after he was given bail on the charges then against him, on 30th July, that the appellant saw the prosecuting sergeant and asked for his help and was told by the sergeant that it was not his custom to help accused persons; in spite of that he went in the evening to see him again and beg him again for his help and tell him he had given £15 to the sergeant in charge of investigations without fruit. It seems to us that a president of a native court who does that, and says that, is not merely begging in order that his case may be put fairly before the court but begging with a sinister purpose; and it is a fair inference that his intention was that the sergeant "might hide the facts in the charges against you" as stated in the 2nd count.

The learned magistrate states in his judgment that "the exact wording of the second count has not been proved". That seems to be due to a misunderstanding of the wording of the second count. It does not state that he begged the sergeant "to hide the facts in the charges", as if those were the words used by the appellant in begging. The second count states that he begged "*in order that* he (the sergeant) might hide the facts in the charges": it means that that was the intention behind the begging, and that was why the appellant was charged with attempting to defeat the course of justice.

Mr. Eso's argument that the prosecuting sergeant was not asked to say whether he understood that that was the appellant's intention in begging for help does not seem to us to be an argument of substance. It was for the court to decide what the intention was, and the learned magistrate's view was that the begging for help could have but one meaning, "namely that P.W.1 was, by act or default, so to conduct the prosecution that accused would be acquitted." That does not seem to us to differ in substance from the statement in the count "in order that he (the sergeant) might hide the facts in the charges against you"; for it would be in that way that the conduct of the prosecution would result in an acquittal.

We think that the second count was proved and that the appellant was rightly convicted of an offence under section 126 (2) of an attempt to defeat the course of justice.

The remaining point on which we ought to make some observations is the point that the appellant was acquitted in the other case. This court decided in the appeal of *Hattab v Inspector-General of Police*, 1956 N.R.N.L.R. 24, that—

"If a police officer believes that an offence has been committed by a person, he has a duty to take steps to have him punished. If any person offers him money to deflect him from that duty, that person commits an offence under section 116 (2) of the Criminal Code,"

as given in Held (1) on p. 25; on p. 29 a passage is cited from *Sogbanmu's* case (12 W.A.C.A. 356, at p. 357) that—

"an offence under the section (viz. section 116) could be committed without any offence having been committed by the person to be improperly assisted by the peace officer" etc.

Likewise we are of opinion that a person may commit an offence under section 126 (2) of the Code if he attempts to defeat the course of justice even though the other case may wind up in an acquittal. What is behind the provision is that the administration of justice must be left to take its proper course: no attempt should be made to sway or deflect prosecuting officers from doing their duty in any particular case.

The appeal is allowed on count 1 and the conviction and sentence are set aside; on count 2 the appeal is dismissed and the conviction and sentence are affirmed; and the appellant is committed to prison to serve his term.

Appeal dismissed.

RUFAI *v* IGBIRRA NATIVE AUTHORITY

[C.A. (Brown C.J. and Smith J.)—July 31, 1957]

[Kaduna—Appeal No. K/27A/1957]

Claim for damages for trespass to land—No physical entry—Order of chief lawful by Moslem law—Whether contrary to natural justice—section 32 (2) *Magistrates' Courts Law*, 1955.

The appellant had for many years been using a small mosque. By order of the Chief he was forbidden to use it for Friday prayers, and Native Authority Police were sent to the mosque to ensure that this order was obeyed. It was not proved that they entered the mosque; but it was established that by their presence and actions they prevented anyone from entering the mosque. The appellant claimed damages for trespass to land, and an injunction to restrain the defendants from repeating and continuing the trespass. He said that if the order of the Chief was lawful according to Moslem law (which he denied), it was contrary to natural justice that the magistrate should have observed it in that it deprived the appellant of a legal right which he had under the common law.

Held:

(1) the claim for damages must fail because no physical entry was proved;

(2) an order which is lawful by native law and custom is not "contrary to natural justice" merely because it is contrary to the common law.

Case referred to:

Harrison v The Duke of Rutland [1893] 1 Q.B. 142 distinguished.

CIVIL APPEAL

Ekineh for the appellant;

Henderson, Crown Counsel, for the respondent.

Brown, C.J. (delivering the judgment of the court): This is an appeal from the learned magistrate at Ilorin dismissing the appellant's claim for damages for trespass and refusing him an injunction restraining the defendants and their servants from repeating or continuing the trespass.

The appellant has for many years been using a small mosque in Okene called the Idoji mosque. In recent years a dispute arose in Okene about the Imamship. There were two candidates—the appellant and one Abdul Rahami; and Abdul Rahami was preferred. The dispute, however, continued until the new Chief, the Ohinoyi, was appointed, when both parties agreed that the dispute should be referred to him for his decision. The Ohinoyi appears to have taken considerable pains before finally arriving at his decision, taking advice from eminent authorities on the law; and on the 6th July, 1956, he gave his decision in writing in the Council Chamber. He decided in favour of Abdul Rahami, and gave his reasons for so doing. He went on to say, quoting from the advice which he had received—

> "(*b*) There cannot be any idea of having two Friday mosques in a town unless such is justified by the size of the population. And there cannot be any idea of establishing a Mosque for Jama'a at worship unless such proposal has received the prior approval of the Chief."

Thus, by order of the Ohinoyi, the appellant was prohibited from making further use of the Idoji mosque for Friday prayers.

The appellant made it clear that he did not accept that decision; and as there had been a clash between the two rival parties shortly before, the Ohinoyi, fearing a breach of the peace, ordered the Native Authority Police to prevent people from going to the Idoji mosque on that day, which was a Friday. The facts which the magistrate found were that both on Friday, July 6th, and again on Friday, July 20th, the police were present at the mosque and by their presence and actions prevented anyone from entering the mosque; but that the appellant had failed to establish that the police at any time entered the mosque.

From beginning to end, the plaintiff's case was that this was a trespass to land. The essential element of trespass to land is that there must be an actual physical entry. The case of *Harrison v The Duke of Rutland* [1893] 1 Q.B. 142 was cited to us as authority to the contrary. In that case Harrison was held to be a trespasser although he did not leave the public highway which ran across the Duke's land. He made no entry upon the land. But the *ratio decidendi* in that case was that the Duke was the owner of the soil under the highway. Harrison, as a member of the public, had the right to use the highway for all reasonable and usual purposes.

Rufai v. Igbirra N.A. — Brown, C.J

But he had no right to use the highway in order deliberately to interfere with the amenities enjoyed by the owner of the land; and in so doing he was held to be a trespasser. Mr Ekineh on behalf of the appellant was unable to quote any other authority against the proposition that in order to establish a trespass to land there must be actual physical entry. The fact that the plaintiff failed to establish that the defendants, their servants, or agents, entered the mosque must dispose of that part of this appeal which relates to the claim for damages for trespass.

There remains the claim for an injunction. It does not follow that because the claim for damages fails, the claim for the injunction must also fail. If a trespass is threatened or reasonably apprehended and likely to occur, an injunction to restrain the defendants from committing a trespass may be granted, even though no trespass has been proved. This raises questions which were argued at considerable length. First is the question whether the Ohinoyi, in prohibiting the appellant from using the Idoji mosque, was making an order which he has power in Moslem law to make. If his order is lawful, and if the only means of enforcing it is to enter the mosque, that would be no trespass. That in turn leads to the question whether the learned magistrate, while accepting that the order was lawful by Moslem law, was right in observing it.

Upon the first question, there was a conflict of evidence; and we can see no reason for disturbing the magistrate's findings that by Moslem law Friday worship may only take place at a Central Mosque; that there may be more than one Central Mosque, but Friday prayers can only be said where there is a properly appointed Imam; and that the Chief may forbid the use of a mosque for Friday prayers where that mosque has no properly appointed Imam, and all Moslems must obey him.

Upon the second question it was said that in refusing to grant the injunction the magistrate's decision was contrary to natural justice, because it purported to deprive the appellant of a legal right which he has under the common law of England. The magistrate was concerned to give effect to section 32 (1) of the Magistrates' Courts (Northern Region) Law, 1955. By that section he was required to "observe and enforce the observance of every native law and custom which is not repugnant to natural justice. . . ." He had found from the evidence that the Chief's order was a lawful one

by native law and custom. He was bound to observe it and enforce the observance of it unless it was repugnant to natural justice.

The point is therefore a short one. Was the Chief's order prohibiting the appellant from exercising his right to use the Idoji mosque for Friday worship repugnant to natural justice? The only reason which was advanced for giving an affirmative answer to that question is that it deprives the appellant of a right which he has under the common law. Another way of putting it would be to say that anything which is not in accordance with the common law is repugnant to natural justice. Yet a third way of putting it would be to say that whenever there is a conflict between Moslem law and English law the latter must prevail. But that is the reverse of what the Magistrates' Courts Law says. By section 32 (2) he is required to apply native law and custom in causes and matters where the parties are natives; and that is what he has done.

The appeal must be dismissed with five guineas costs.

Appeal dismissed.

INSPECTOR-GENERAL OF POLICE *v* IGHOROJI

[C.A. (Brown C.J. and Smith J.)—July 20, 1957]

[Kano—Criminal Appeal (Case stated) No. K/M7/1957]

Criminal Law and Procedure—Autrefois convict—Time for pleading—Whether during the course of the trial an accused person may withdraw his plea and substitute a plea in bar of autrefois convict—section 221 *of the Criminal Procedure Ordinance.*

Evidence was given during the course of the trial suggesting that the accused had previously been convicted of an offence upon the same facts. The accused, on the advice of his counsel, applied to withdraw his general plea and substitute a plea in bar of *autrefois convict.* The magistrate held that he was too late, but agreed to state a case.

Held: A court has a discretion to allow a plea to be withdrawn at any time before judgment, and for any purpose; and its discretion is no less when the purpose is to substitute a plea under section 221 of the Criminal Procedure Ordinance.

Per curiam: When there is evidence which suggests that the accused has been previously acquitted or convicted of the same offence or of any other offence upon the same facts the court has a duty to enquire into the matter with a view to ascertaining whether it is a proper case for the exercise of its discretion to allow him to withdraw his plea; and on being satisfied that it is a proper case for a plea of *autrefois acquit* (or *convict*) to be heard and determined a court is not required to wait until an application to withdraw the general plea is made.

Cases referred to:

Edu v Commissioner of Police 14 W.A.C.A. 163 distinguished;

Reg. v Pategi 1957 N.R.N.L.R. 47 distinguished;

Flatman v Light [1946] K.B. 414 applied;

R. v McNally [1954] 2 All E.R. 372 applied.

CASE STATED

Shyngle for the appellant;

McLean, Crown Counsel, for the respondent.

Brown, C.J. (delivering the judgment of the court): In this case stated the question which was put for our consideration was—

> "Whether during the course of a trial an accused person can withdraw a general plea and substitute a plea in bar of *autrefois convict*."

On the 31st May we gave the following reply, intimating that we would give our reasons later—

> "The answer to the question asked by the magistrate is that the accused can withdraw his general plea and substitute a plea in bar if the court gives him leave. The court has a discretion to allow him to withdraw his plea or not. In the event of the magistrate exercising his discretion in favour of the accused, the provisions of section 221 of the Criminal Procedure Ordinance will then apply."

The accused was charged before the magistrate with three offences all arising out of a transaction relating to alleged illicit selling of gold. The first charge was one of false pretences under section 419 of the Criminal Code; the second charge was attempted stealing under section 509 of the Criminal Code; and the third charge was under section 15 (1) of the Gold Trading Ordinance for selling raw gold without a licence. The accused pleaded not guilty to the first and second charges, and guilty to the third charge. During the course of the hearing, a prosecution witness said: "Accused was charged (before the Chief Alkali of Kano) with selling as gold a metal which was not gold; and also because he had no gold dealer's licence. It amounted to a false pretences charge. He was convicted and sent to prison". Learned counsel for the defence thereupon submitted that a plea in bar should then be made; and the accused on counsel's advice made an application to withdraw his general pleas and to substitute pleas of *autrefois convict*. The learned magistrate held that he was too late; but agreed to state a case for our consideration.

By section 181 of the Criminal Procedure Ordinance, an accused person who has been previously convicted or acquitted of an offence is not liable to be tried again for the same offence, nor on the same facts for any other offence for which he might have been convicted at the previous trial. By section 53 of the Interpretation Ordinance "when any act or omission constitutes an offence under two or more Ordinances . . . . the offender shall be liable to be prosecuted and punished under either or any of such Ordinances . . . . but shall not

I.G.P. v Ighoroji — Brown, C.J.

be liable to be punished twice for the same offence." Section 221 of the Criminal Procedure Ordinance empowers an accused person to plead in bar, and sets out the procedure. Sub-section (3) of that section clearly contemplates that such a plea should be made and determined before he makes his general plea to the charge. By section 217 every person by pleading generally the plea of not guilty shall be deemed to have put himself upon his trial.

In *Edu v Commissioner of Police* 14 W.A.C.A. 163 the view was expressed *obiter* (*a*) that a plea in bar under section 221 is not a matter for submission by counsel, but must be made by the accused himself; and (*b*) that it ought to be made at the beginning of the trial before his general plea is taken. Thus a plea in bar cannot be made so long as there is a general plea upon the record. In *Reg. v Pategi* 1957 N.R.N.L.R. 47 one of the accused's counsel indicated during the trial that he wished to make a submission of *autrefois acquit* after his client had given evidence. No application to withdraw his general plea was made, and it was held that by pleading not guilty he had surrendered his right to plead in bar; though the question of whether he would have been able to withdraw his general plea if an application has been made and to substitute a plea in bar was left open.

The distinction between the present case and those two cases is that in the present case the learned magistrate had before him an application to withdraw the general plea in order that the accused might plead in bar. By section 53 (*b*) of the Magistrates' Courts Law the the practice and procedure in his court is regulated, in his criminal jurisdiction, by the provisions of the Criminal Procedure Ordinance. It is true that section 221 of the Criminal Procedure Ordinance clearly contemplates that a plea in bar should be made before the general plea; but it affords no guidance upon whether a general plea may be withdrawn in order that a plea in bar may then be made. By section 30 (*a*) of the Magistrates' Courts Law, subject to the provisions of any written law, a Magistrate is required to apply the common law. As the written laws of this country afford no guidance upon the question of whether a general plea may be withdrawn for this purpose, and as the point does not appear to have been judicially determined by the courts of this country, we must have recourse to the common law practice in England. This has been stated in two recent cases. In *Flatman v Light* [1946] K.B. 414 the following view was expressed by the Lord Chief Justice in dealing with a case

from a court of summary jurisdiction where the accused had at first pleaded guilty but later withdrawn their pleas—

> "In common justice and fairness, if during the course of a case it turned out that a man had been previously convicted or acquitted of the same offence with which he was then charged, the court would, of course, allow him to plead it and would give effect to that plea. When a case is before justices I doubt very much whether it is right to say that a plea that a man has been already aquitted or convicted of a previous offence is in any strictness a plea of *autrefois acquit* or *autrefois convict*, because those pleas are pleas which have to be pleaded formally, because they form part of the record of the court. They ought to be pleaded in writing and then a replication is pleaded by the prosecution. When a case is being dealt with by a court of summary jurisdiction I think it is true to say that what the court must do is to give effect to the maxim *Nemo debet bis vexari pro una et eadem causa*. I do not think it is technically *autrefois acquit*, but that does not matter."

In the case of *R. v. McNally* [1954] 2 All E.R. 372 the accused applied to withdraw his plea of guilty before sentence was passed. In that case—unlike the case of *Flatman v Light*—there was no question of the accused having been previously convicted of the same offence. He merely wished to change his plea to one of not guilty. But in England the practice is well recognised that a court has a discretion to allow an accused person to withdraw a plea which he has already made, at any time before sentence, whatever the reason for his application may be, and that its discretion is no less if the reason for the application is to substitute for his former plea a plea which is in effect a plea in bar. In that case, the Lord Chief Justice said—

> "The question whether or not a plea can be withdrawn is entirely one for the learned judge who is not bound to allow a plea to be withdrawn once it has been made. If the court came to the conclusion that there was a question of mistake or misunderstanding, or that it would be desirable on any ground that the prisoner should be allowed to join issue, no doubt, the court would allow him to do it."

We can see nothing in our Criminal Procedure Ordinance to prevent a court in this country from exercising a similar discretion. The only distinction, where a plea in bar is involved, between the law of England and the law of Nigeria

I.G.P. v Ighoroji — Brown, C.J.

is in the matter of procedure. In trials upon indictment in England the formality of a written plea of *autrefois acquit* (or *convict*) by the accused and a replication by the prosecution is the practice, while in courts of summary jurisdiction no special formality is required. But in Nigeria, whether the trial is upon information or summary, the procedure is laid down in section 221 of the Criminal Procedure Ordinance. Although that section contemplates that the plea in bar should be made and determined before the general plea is made, we cannot see that it prevents a court from allowing the general plea to be withdrawn in order that a plea in bar may be made. If the court, in the exercise of its discretion, allows this to be done, it must then comply with section 221 and determine whether such plea is true in fact. If it finds that it is false in fact, the accused must then be required to plead again to the charge or information.

We think that the matter may be tested in this way. Where—as in the present case—there is evidence before the court which suggests that the accused may have been previously convicted (or acquitted) of the offence, unless the court inquires into the matter it cannot know if he has been previously convicted or acquitted or not. If he has, the court—through its failure to allow the plea in bar to be made after due enquiry—may be contravening section 181 of the Criminal Procedure Ordinance.

We would only add one thing. When there is evidence before the court which suggests that the accused has been previously convicted or acquitted of the same offence, the court has a duty to inquire into the matter and, if need be, may call further evidence to ascertain if it is a proper case for the exercise of its discretion in favour of the accused. If the court is satisfied that it is a proper case we do not think that the court is required to wait until an application for the withdrawal of the general plea has been made. There may be no such application—either because the accused is not represented or for some other reason. Whenever it appears to the court, from the evidence before it, that there may be a danger of section 181 of the Criminal Procedure Ordinance or section 53 of the Interpretation Ordinance being contravened, it is in our view the duty of the court to offer to the accused facilities to withdraw his general plea and substitute a plea under section 221.

NWAGU *v* LAWAL WAWA

[C.A. (Brown C.J. and Smith J.) July 12, 1957]

[Zaria—Criminal Appeal No. Z/4A/1957]

Road Traffic—Powers of Police to detain an article, with a view to a prosecution, if such article is or may be material to the charge—Reg. 44 (*e*) *Road Traffic Regulations*, 1948—*Claim in detinue for wrongful detention.*

The facts are fully set out in the judgment.

Held: In detaining a defective tyre, with a view to a prosecution under Reg. 44 (*e*) of the Road Traffic Regulations, 1948, for failing to carry at least one spare inflated tyre affixed to a rim or spare wheel, a police officer may also detain the rim or spare wheel to which it is affixed.

Cases referred to:

Elias v Pasmore [1934] 2 K.B. 164 applied.

CRIMINAL APPEAL

Razaq for the appellant.

Nasir, *Crown Counsel*, for the respondent.

Brown, C. J. (delivering the judgment of the court): The appellant was the plaintiff in the court below, and claimed damages for detinue. The respondent was a police constable; and on the 28th August, 1956, he found the plaintiff's lorry with a defective spare tyre which he seized, together with the wheel, for use as evidence in court. The tyre was pierced in the centre by a stone, and the tube was punctured. There was no air in the tube or tyre. The learned magistrate found as a fact that later that day the appellant demanded the return of the wheel, and that the respondent refused to return it pending the decision of the court. Thereupon the appellant, without taking any further step, hired another lorry at £6-10*s* a day, which he used until the 26th September when the court ordered the return of the wheel to him. He claimed £195 damages, being the sum which he paid for the hire of the lorry during the time the wheel was in police custody.

The learned magistrate held: (*a*) that the respondent's refusal to return the wheel to the plaintiff was a tortious act which rendered him liable in a claim for damages; (*b*) that the appellant had failed in his duty to take all reasonable steps to mitigate the damage, and he was not entitled to the damages

Nwagu v Wawa

Brown, C.J.

which he claimed. He held that owing to his failure to take any reasonable step to mitigate the damage he was not entitled to any damages.

We entirely agree that the appellant was not entitled to the damages which he claimed; but upon the assumption that the respondent's act in retaining the wheel together with the tyre was tortious, we would not be prepared to agree with the learned magistrate that he was not entitled to any damages at all. But if the learned magistrate's attention had been drawn to the case of *Elias v Pasmore* [1934] 2 K.B. 164, we do not think that he would have held that the respondent's act was tortious. It is clear from that case that where the police, in the exercise of their duty, have detained an article with a view to a prosecution, they are entitled to retain any article which is in the possession or control of the person whom it is proposed to prosecute if such article is or may be material to the charge.

It therefore seems to us that the essential question in this case is whether the wheel was, or might be, material to the charge in respect of which the tyre was seized. It is not disputed that the appellant was served with a summons under Regulation 44 (*e*) of the Road Traffic Regulations, 1948, which was subsequently withdrawn. That regulation requires that—

> "(*e*) there shall always be carried on the vehicle at least one spare inflated tyre affixed to a rim, spare wheel or other device capable of being quickly fitted to a wheel or axle."

It is impossible to say that the wheel was not, or might not, be material to a charge under this regulation; and we therefore cannot agree with the learned magistrate's view that the respondent's action in retaining the wheel was wrongful. For that reason no question of damages could arise in this case; and the appeal is dismissed with five guineas costs.

Appeal dismissed.

GILBERT ORIJA *v* INSPECTOR-GENERAL OF POLICE

[C. A. (Brown C. J. and Smith J.)—June 14, 1957

[Kano—Criminal Appeal No. K/29A/1957]

Criminal Law and Procedure—Attempt—Conviction for attempted stealing—An act which manifests an intention to steal is not of itself sufficient—Necessity for proof of some act which is so connected with the offence of stealing that it shows that the accused has begun to put his intention into execution—section 4 of the Criminal Code.

The appellant was charged with stealing the sum of £7-10*s*-0*d* the property of his employers; he was convicted of attempting to steal. The appellant was a clerk who was responsible for receiving money from customers and issuing receipts. He was required to make out the receipts in triplicate. The top copy was issued to the customer; the second copy was to be handed by the appellant to the cashier with the money at the close of business or early on the following morning, the third copy remained in the receipt book. On February 12th a customer paid £7-10*s*-0*d*. He paid £2 in notes and £5-10*s*-0*d* in coin. The appellant issued to him the top receipt for £7-10*s*-0*d*; but he made out the second and third copies for 4*s*-9*d* which he received from another customer. He did not hand the £7-10*s*-0*d* to the cashier on that day or on the following day; and there was no evidence to show what monies were handed to the cashier on those two days. On February 14th the sum of £8-12*s*-6*d* was found in the appellant's drawer. This sum was made up of £6 in notes and £2-12*s*-6*d* in coin. This money was unidentifiable; and the appellant said it was a surplus. The customer had paid £5-10*s*-0*d* in coin and £2 in notes. This sum of £7-10*s*-0*d* was not separated from the other monies in the drawer.

Held: While the falsification of the second and third copies of the receipt showed an intention to steal, a charge of attempting to steal must be established by proof of some act which is so connected with the offence of stealing that it shows that the appellant had started to put his intention into execution. If the appellant has separated the £7-10*s*-0*d* from the other monies in the drawer that might have been such an act as would prove that the attempt had begun. But upon the evidence the acts of the appellant amounted to no more than preparation to

Orija v. I.G.P. Smith, J.

commit the offence, and there was no act which established that the appellant had begun to put his intention into execution so as to constitute an attempt.

Cases referred to:

R. v Eagleton 169 E.R. 766 followed;

Hope v Brown (1954) 1 W.L.R. 250 followed.

CRIMINAL APPEAL

Lewis Thomas and *Shomade* for the appellant;

McLean, Crown Counsel, for the respondent.

Smith J. (delivering the judgment of the Court): The appellant was employed by the United Trading Company, Kano, as chief clerk in their workshops. He was responsible for collecting from customers money paid by them for repairs; and was required to prepare a receipt in triplicate for each such payment. The top copy of the receipt was to be handed to the customer; the second copy was to be taken by the appellant to the cashier with the payment made before he closed for the day or at the latest the first thing the next morning; the third copy of the receipt remained in the receipt book. On 12th February a customer paid the appellant £7-10*s*-0*d* on account of his employers. The appellant prepared only one receipt—the top copy—for £7-10*s*-0*d* which he handed to the customer. He did not make out the second and third copies of the receipt for £7-10*s*-0*d*, but filled in these copies with the details of another transaction for 4*s*-9*d* which he received from another customer. The appellant put the £7-10*s*-0*d* in his drawer of which he had the key. He did not hand over the £7-10*s*-0*d* to the cashier either on the 12th or the 13th. On 14th February the engineer in charge of the workshops inspected the drawer in the presence of the appellant and found there £8-12*s*-6*d* which the appellant said was a surplus. The magistrate found that this sum included the £7-10*s*-0*d* which was the proceeds of the fraud. He also found that the appellant had separated the surplus money, including the £1-2*s*-6*d*, from the money correctly in the appellant's custody and that the appellant intended to steal the £7-10*s*-0*d*. When the drawer was inspected on 14th February, the engineer said he found £6 in notes in an envelope in the cash box and £2-12*s*-6*d* in coin, some of which was tied up in a yellow duster and some of which was loose. The next day—the 15th—P.C. Sobide said he found £2-0*s*-0*d* in notes underneath the cash box and £2-12*s*-6*d* in coin in the duster; and that the engineer informed him he had

recovered £4-0*s*-0*d* in an envelope. The discrepancy in this evidence is not material. The importance of the evidence of the engineer and the policeman is that a sum totalling £7-10*s*-0*d* was not found to have been separated in the drawer. The learned magistrate found that the appellant had separated the £8-12*s*-6*d* from the money properly in his custody. But there was no evidence that the appellant had received any monies—other than the £7-10*s*-0*d* and the 4*s*-9*d*—on either the 12th or the 13th—which he had handed over to the cashier, and the magistrate could not therefore find, as it appears to us that he did find, that the money left in the drawer had been separated from the money handed over to the cashier.

The appellant was charged with stealing the £7-10*s*-0*d*, and convicted of attempting to steal it. The only question in this appeal is whether the evidence set out above proved the attempt or amounted to no more than evidence of mere preparation to commit the theft.

An attempt to commit an offence is itself a misdemeanour, by section 508 of the Criminal Code. The definition of "attempt" is contained in section 4 and reads:

> "When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence."

The offence of stealing is defined in section 383 of the Code: subsection (1) says:

> "A person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing."

Applying the definition of attempt to the offence of stealing, the prosecution have to prove (1) that there was an intention to steal which may be inferred from the surrounding circumstances; and (2), an overt act which manifests the intention to steal. The definition of stealing in section 383 is compendious. Read in conjunction with section 390 (6) of the Code which says:

> "If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years"

it includes the three separate offences of: larceny, embezzlement and fraudulent conversion in English Law. In the

Orija v I.G.P. Smith, J.

present case, the attempt, if any, was an attempt by the appellant to convert to his own use money he had received on account of his employers. The intention to steal was proved by the facts that the appellant instead of making out the cashier's copy of the receipt for £7-10*s*-0*d* filled in the receipt for 4*s*-9*d* which referred to a separate transaction and omitted to hand the £7-10*s*-0*d* to the cashier. The problem is whether that intention was manifested by an overt act.

We are indebted to Mr McLean for bringing to our notice the English authorities which deal with the tests to be applied in deciding whether the facts of any particular case disclose an overt act. The test most frequently applied is that laid down by Parke B. in *R. v Eagleton* and followed in *Hope v Brown* [1954] 1 W.L.R. 250 where Lord Goddard L.C.J. said: "The locus classicus of what amounts to an attempt is *R. v Eagleton* where Parke B. said: 'Some act is required, and we do not think that *all* acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be be considered as attempts to commit it, but acts immediately connected with it are'." Eagleton was charged with obtaining money by false pretences but before the time for the payment of the money arrived the fraud was discovered. On the facts of that case Eagleton had committed the last act depending upon himself towards the payment of the money and was convicted of an attempt.

But it is not necessarily the last act in every case which proves the attempt. All that is required is an act immediately connected with the particular offence which clearly shows that the offender was attempting to commit it. That is what section 4 of the Criminal Code requires, i.e., an overt act which clearly manifests the intention but which does not amount to its fulfilment. It may be the last of a series of overt acts because up to that point it is not clear whether the offender is attempting to commit the particular offence charged or some other offence. It may be the first act because that act was unequivocally an attempt to commit the particular offence and no other. The test in *Eagleton* is applicable to section 4 of the Criminal Code because it is necessary to ascertain the acts immediately connected with the crime in order to decide which overt act or acts clearly manifest the intention to commit that crime. But a more practical test is that suggested by the learned author of Russell on Crime (10th Ed. p. 1790): "the prosecution must prove that the steps taken by the accused must have reached the point when

they indicate beyond reasonable doubt what was the end to which they were directed."

The first overt act of the appellant was to make out only one copy of the receipt for £7-10*s*-0*d* instead of three copies as he was required to do; the second was to use these blank copies for the purpose of making out a receipt for 4*s*-9*d* for another transaction. These two acts disclosed his intention to steal the £7-10*s*-0*d* and were the means by which he hoped to cover up the theft. But they do not disclose an attempt by the appellant to convert to his own use the actual notes and coins he received on account of his employers. The appellant put the money in the drawer where he kept all monies received on their behalf. When the drawer was examined two days later it contained £6 in notes and £2-12*s*-6*d* in coin. The sum of £7-10*s*-0*d* had not been separated from the £1-2*s*-6*d*. The monies in the drawer were unidentifiable. The customer had handed over £5-10*s*-0*d* in coin and £2 in notes. Only £2-12*s*-6*d* in coin was found in the drawer. What happened to the balance we do not know. It may have been included in monies handed to the cashier. But the cashier was never called to say what monies if any were handed to him by the appellant on the 12th and 13th February and there is, therefore, no evidence on this point.

Had there been proof that monies were paid over by the appellant to the cashier on either of these days and that these monies did not include the £7-10*s*-0*d* it would have proved the complete offence of stealing. Or, had there been evidence that the appellant had separated the £7-10*s*-0*d* in the drawer from the other monies in the same drawer, that might have been a sufficient overt act to manifest the attempt. But on the evidence as it stands we are of the opinion that the acts of the appellant amounted to no more than preparation because there was no act which manifested his obvious intention to steal by beginning to put his intention into execution.

The appeal is allowed and the conviction quashed.

Appeal allowed.

SILAS EBUTE *v* INSPECTOR-GENERAL OF POLICE

[C.A. (Hurley, Ag. S.P.J. and Reed J.) July 13, 1957]

[Jos—Criminal Appeal No. JD/23CA/1957]

Criminal Law—Corruption—Section 116 *of the Criminal Code—Meaning of "with a view to corrupt or improper interference with the due administration of justice".*

The appellant asked a blacksmith if he had railway sleepers for sale. On being told that he had, the appellant produced evidence of his identity as a Police officer and said that he would arrest the blacksmith. The blacksmith produced a paper purporting to be a receipt for the sleepers. The appellant said it was useless because the Railway's receipts were stamped and this paper was not. He said that if he was not "to go further" with the matter the blacksmith should give him £10. The appellant was convicted of a charge under section 116 (1) of the Criminal Code.

Held: Whether the blacksmith had in fact committed an offence was immaterial. It was sufficient for a conviction under the section that there was a matter which it was the appellant's duty to investigate.

Per curiam: It is not correct to say that it is not possible for an accused person to be guilty, on the same facts, of offences under both sections 116 and 406. The same facts may well establish offences under both sections.

Cases referred to:

R. v Romanus Ezejiogu 10 W.A.C.A. 230 distinguished;

Linus Ezeji and another v Inspector-General of Police, unreported (Jos Appeal JD/24A/55, 9 May, 1955) distinguished;

Sogbanmu v Commissioner of Police 12 W.A.C.A. 356 applied;

Hattab v Inspector-General of Police 1956 N.R.N.L.R. 24 applied.

CRIMINAL APPEAL

Agbakoba for the appellant.

Nunan, Crown Counsel, for the respondent.

Reed J. (delivering the judgment of the court): This is an appeal from the decision of the Magistrate, Grade I, who convicted appellant under section 116 (1) of the Criminal Code at Gboko on 15 February, 1957, and sentenced him to sixteen months' imprisonment with hard labour.

Counsel for appellant abandoned the original ground of appeal and the second of the additional grounds of appeal; he relies upon the first of the additional grounds of appeal, namely that the magistrate erred in law in convicting under section 116 (1) of the Criminal Code.

The magistrate accepted the evidence of the complainant, Ali Makeri, a blacksmith, and Ali Makeri told the court below that appellant came to him with the second prosecution witness, who asked him if he had any railway sleepers for sale; Ali Makeri said he had; there was a discussion as to price and appellant was shown the sleepers; appellant then said he was a police constable and produced evidence of identity; appellant said he would arrest Ali Makeri, that the Police were looking for railway sleepers missing from the railway; Ali Makeri said the sleepers were not his and that somebody else had a permit or receipt for the sleepers; a paper was produced and appellant said it was useless, that it was not the Railway's because the Railway's papers were always stamped; appellant then said that if he was not "to go further with the matter" he should be given £10; his demand was refused; later appellant said he was not going on with the matter.

Counsel for appellant did not contest the magistrate's findings of fact but submitted that these facts, if they established any offence, established extortion as defined by section 406 of the Criminal Code. He also submitted that it was not possible for an accused person to be guilty, on the same facts, of offences under both sections 116 and 406 of the Criminal Code; but with this submission we do not agree. In our view the same facts may well establish offences under both these sections.

In *R. v Romanus Ezejiogu* 10 W.A.C.A. 230, the appellant, a police constable, had been convicted of an offence under section 116 (1) of the Criminal Code. The evidence showed that he threatened to prosecute the complainant for buying a watch without a receipt from the trader who sold it, falsely alleging that there was a new law which made his omission to take a receipt punishable; the appellant took the watch and offered not to take the complainant to court if given money;

Ebute v I.G.P. Reed, J.

he was given money. His appeal was allowed, and the Court said, at page 232:

> "We are of opinion . . . . that section 116 (1) of the Criminal Code does not apply to cases where there is no ground for a suggestion that an actual offence has been committed by the person from whom money is demanded. In such a case the demand is not made either 'with a view to corrupt or improper interference with the due administration of justice, or the procurement or facilitation of the commission of any offence, or the protection of any offender from detection or punishment'."

Counsel for appellant referred the court to *Linus Ezeji and another v Inspector-General of Police* (unreported; judgment of Bairamian J. given in the Supreme Court, Jos, on 9 May, 1955; Appeal No. JD/24A/55). This judgment, we suggest, is similar to *Ezejiogu's* case in its effect. In *Ezeji's* case appellants, policemen, had been convicted in the Magistrate's Court under s. 116 (1). The facts were as follows: appellants told complainant (one Sapele) that a search warrant was being prepared to search his, complainant's house, and that £4 in counterfeit notes had been "planted" in his room; they asked for a sum of money in order that the house should not be searched. Their appeal was allowed. Bairamian J. stated:

> "The magistrate took the view that no information had been laid against Sapele; so Sapele was not an offender, nor even a suspected offender: and if no search warrant was issued to search an innocent man's house, justice would not have suffered."

Counsel for appellant drew the attention of the court to passages in the judgment of the magistrate which, we agree, show that the magistrate believed that appellant's investigations concerning the sleepers were not genuine; that he approached the complainant not with a veiw to the administration of justice but with a view to extorting money from him. We would observe that this was the magistrate's opinion. There was no evidence to support it—except, perhaps, the fact that appellant, after his demand for money had been refused, took no further steps in his investigations; though this could be explained, possibly, by fear, because he knew that he had put himself into a very difficult position by demanding a bribe.

However, even if the appellant did begin his investigations with the sole object of extorting money it does not, in our view, follow that there has been no offence under section 116,

A police constable is under a duty, at any time, to investigate if he suspects that an offence has been committed. Let us suppose, for example, that a constable, off duty, goes to a remote village with the sole object of extorting money. He identifies himself as a constable and asks to see firearms. A firearm is produced and the constable asks for the licence. The owner admits the firearm is not licensed. The constable asks for a sum of money in order that the owner should not be arrested and prosecuted. In our view the constable is guilty of an offence under section 116. *Ezejiogu's* case does not apply; it cannot be said that "there is no ground for a suggestion that an actual offence has been committed by the person from whom money is demanded".

Even if we assume that appellant made the investigations in the case now before us with the sole object of extorting money, can it be said that there was "no suggestion" that Ali Makeri had committed an offence? Ali Makeri was in possession of railway sleepers and thefts of railway sleepers are notoriously common; appellant said the permit for the sleepers was useless because it did not have the Railway's stamp. Did not the appellant unintentionally find something which it was his duty to investigate; or, to quote the test applied in *Ezejiogu's* case, can it be said that there was "no suggestion" that Ali Makeri had committed an offence? Whether an offence has, or has not, in fact been committed is irrelevant; vide *Sogbanmu v Commissioner of Police* 12 W.A.C.A. 356 and *Hattab v Inspector-General of Police* 1956 N.R.N.L.R. 24.

In our view the facts which the magistrate found proved did suggest that an offence might have been committed by Ali Makeri; the asking of money by appellant in order that he should not "go further with the matter" did, therefore, establish an offence under section 116 (1) of the Criminal Code and he was properly convicted under that section. The appeal is dismissed.

Appeal dismissed.

STOCK *v* COMMISSIONER OF POLICE

[C.A. (Bairamian S.P.J. and Hurley J.) April 20, 1957]

[Jos—Criminal Appeal No. JD/16CA/1957]

Road Traffic—Definition of "commercial vehicle" in section 2 of the Road Traffic Ordinance, 1947—Meaning of "personal effects".

The appellant was a director of a mining company. He was convicted of driving a kitcar, being a commercial vehicle the property of the company, at more than thirty-five miles an hour, contrary to regulation 36 (1) (*a*) (*ii*) of the Road Traffic Regulations, 1948. The vehicle was never let out for hire or reward, and it was used by its owner, the company, *inter alia* for carrying tin for sale. The appellant contended that it was used exclusively for carrying the personal effects of the company and did not therefore fall within the definition of a "commercial vehicle".

Held: In the definition of "commercial vehicle" in the Road Traffic Ordinance, 1947, the term "personal effects" has a narrower meaning than the word "goods". Among goods which are not personal effects are goods carried commercially, whether for hire or reward or for sale or purchase. The company used its kitcar for carrying its tin for sale. It was not, therefore, "used exclusively for carrying the personal effects of the owner", and it came within the definition of a "commercial vehicle".

CRIMINAL APPEAL

Rickett for the appellant;

Nunan, Crown Counsel, for the respondent.

Hurley, J. (delivering the judgment of the court): The appellant was convicted under regulations 36 (1) (*a*) (*ii*) and 102 (1) of the Road Traffic Regulations, 1948, of driving a commercial vehicle at more than thirty-five miles an hour on the highway. The vehicle was a kitcar, a vehicle primarily designed for the carriage of goods. It was the property of a limited liability company engaged in mining, of which the appellant was a director, and it was used for the purpose, among others, of carrying tin mined for sale by the company. It was never let out on hire, and never used for carrying

belongings not of the company. The appellant appeals on the ground that the vehicle was not a commercial vehicle within the meaning of that expression as defined in the Road Traffic Ordinance, 1947. The definition is in section 2 of the Ordinance, and is as follows—

> '"commercial vehicle" means a hackney carriage, a stage carriage, a tractor, a break-down lorry and any motor vehicle primarily designed for the carriage of goods, excluding any such vehicle used exclusively for carrying the personal effects of the owner and not for hire or reward'.

It is the appellant's contention that the vehicle, which was not used for hire or reward, was used exclusively for carrying the personal effects of its owner, the company, and was therefore not a commercial vehicle. The question then is whether tin mined by the company for sale was part of the personal effects of the company. We are of opinion that it was not.

The word "effects" means much the same as the expression "goods and chattels". The expression "personal effects" is of wide use, but we do not think it necessary or helpful here to inquire what meanings it may have elsewhere than in the definition of "commercial vehicle" in the Ordinance. That definition is not ". . . . any motor vehicle primarily designed for the carriage of goods, excluding any such vehicle used exclusively for carrying the goods of the owner . . ."; it is " . . . any motor vehicle primarily designed for the carriage of goods, excluding any such vehicle used exclusively for carrying the personal effects of the owner". Therefore "personal effects" is not the same as "goods", but has a narrower meaning, so that, for the purposes of the definition of a commercial vehicle, there are some goods of the owner that are not personal effects of the owner. Among goods which are not personal effects, but are goods such that carrying them in the vehicle leaves it with its character of a commercial vehicle, must we think be numbered goods used or intended for commerce, that is, for sale or purchase, and goods carried commercially, that is, for hire or reward. The company's tin mined for sale which the kitcar in this case was used to carry was intended for commerce. The vehicle was a commercial vehicle as defined in the Ordinance and the appeal is dismissed.

Appeal dismissed.

D. K. EJUKORLEM AND COMPANY LIMITED *v* CHIEF INSPECTOR OF MINES

[C.A. (Hurley Ag. S.P.J. and Reed J.) July 13, 1957]
[Jos—Criminal Appeal No. JD/24CA/1957]

Minerals—Unlawful possession of controlled minerals—Lessee of mining lease—Possessor holding under irrevocable power of attorney given by lessee for valuable consideration—Governor's consent not obtained—Whether possessor lessee's agent—Whether possessor lessee—Power of attorney an assignment of rights under lease—Conveyancing Act, 1882, *s.* 8—*Minerals Ordinance, Cap.* 134, *ss.* 2, 13, 66 (*a*), (*d*).

Section 66 of the Minerals Ordinance prohibits the possession of controlled minerals except by certain persons, including the lessee of a mining lease over the ground where the mineral was won and an agent or employee of the lessee. By section 2, the "lessee" of a mining lease includes all persons having any right or interest in or under the lease, whether by assignment or otherwise. By section 13, no mining lease, and no portion of the rights or interests conferred by a mining lease, may be assigned without the Governor's consent in writing endorsed on the instrument of assignment, and an assignment without that consent is void.

The appellant company were in possession of a controlled mineral, columbite ore, won from ground held under mining leases granted to a third party. The third party, for valuable consideration, had executed an irrevocable power of attorney authorising the appellant company to mine in the area comprised in the leases and sell the minerals won and retain the proceeds of sale as their own absolute property without accounting for them. The Governor's consent had not been endorsed on the power of attorney.

Appealing against their conviction for the unlawful possession of the columbite ore contrary to section 66, the company contended that they were entitled to possess it as the third party's agents under the power of attorney, or alternatively, as being themselves the lessees because the power of attorney had given them an interest in the lease otherwise than by assignment.

Held:

(1) The power of attorney operated as a conveyance of portion of the rights and interests conferred by the

leases, so that it did not make the appellant company the agents of the third party, but purchasers; and

(2) the power of attorney could operate only as an assignment and not as any other form of conveyance, so that, being void for want of the Governor's consent, it did not make the appellant company the lessees of the area.

CRIMINAL APPEAL

Agbakoba for the appellant.

Nunan, Crown Counsel, for the respondent.

Hurley, Acting S.P.J. (delivering the judgment of the Court): This appeal is against a conviction for possession, in October, 1956, of a controlled mineral, columbite ore, contrary to section 66 of the Minerals Ordinance. The facts are not in dispute. The appellant is a limited liability company engaged in mining. The company was in possession of 806 pounds of columbite ore won from areas comprised in leases not granted to the company but to two other mining concerns. These concerns had executed irrevocable powers of attorney for valuable consideration purporting, *inter alia*, to authorise the company to mine in the areas. In answer to the charge the company contended that by virtue of the powers of attorney they were entitled to possess the ore under section 66 (*a*) of the Ordinance as lessees of the areas within the meaning of the word "lessee" as defined in section 2, or alternatively under section 66 (*d*) as the duly authorised agents of the lessees. The learned Chief Magistrate held against the company on both points, and they are the questions for decision in this appeal. It is a test case; irrevocable powers of attorney of the kind we have to consider are widely used as supposedly conferring authority for the possession of minerals and, we understand, for the occupation, working, and management of mining areas which have neither been leased to the donees of the powers nor assigned to them with the Governor's consent.

Section 66 of the Ordinance provides—

> No person other than a Government servant acting in the execution of his duty shall possess any controlled mineral unless—
>
> (*a*) such mineral has been won from ground held under a mining lease or temporary mining lease of which he is the lessee and which entitled him to mine that mineral, or . . . . . .

Ejukorlem & Co. Ltd. v. C.I.M.

Hurley, Ag S.P.J.

(*d*) he is in respect of that mineral within the meaning of the regulations a duly authorised agent or employee of a person permitted by paragraphs (*a*), (*b*) and (*c*) of this section to possess that mineral.

In section 2 "lessee" is defined as follows—

> "lessee" of a mining lease includes all persons having any right or interest in or under a mining lease, whether by assignment or otherwise.

The areas from which the ore had been mined of which the company was in possession in October, 1956, were then the subject of temporary mining leases Nos. 12682, 12582 and 12583. The last two, Nos. 12582 and 12583, were granted to a mining concern called the Plateau Mining Syndicate on 22nd September, 1956, for two years. On 5th April, 1956, the applications for these leases had been included in a power of attorney made by the Plateau Mining Syndicate in favour of the company, Exhibit O, which is one of the two irrevocable powers of attorney relied on by the company in this case. The other, Exhibit N, was made in favour of the company by the Urhobo Syndicate, who were the grantees of the remaining lease, No. 12682. This lease was granted on 30th May, 1956, but the power of attorney was not executed until 24th November, 1956, and it can therefore afford no protection to the company for their possession of controlled minerals in October, 1956. About one-tenth of the columbite ore of which the company were in possession that month had been mined from the area comprised in temporary mining lease No. 12682. It follows that the appeal against conviction must fail whatever view we take of the effect of the earlier power of attorney. However, though the fine of £5 imposed in the Court below was a nominal one, it would be open to us to reduce it to a still smaller sum, if we thought fit, were we to hold in the appellant's favour in regard to the possession of the remaining nine-tenths of the ore. So we will consider the two questions raised in this case, so far as they depend on leases Nos. 12582 and 12583 and the irrevocable power of attorney Exhibit O.

The power of attorney Exhibit O is in the form of a deed executed by the Plateau Mining Syndicate by its attorney. It recites that the Syndicate, thereinafter called the Vendor, is the "registered Proprietor and sole Owner of or applicant for the Mining Properties set out in the Schedule hereto". The Schedule sets out a temporary mining lease, which has

nothing to do with this case, and two applications for mining leases, Nos. 12582 and 12583. We take notice of the usage on the Plateau minesfield whereby the word "lease" means the subject-matter of a mining lease rather than the leasehold interest. The expression "Mining Properties" in Exhibit O denotes the areas comprised in the temporary mining lease and the two applications set out in the Schedule, considered as the subject-matter of, and in association with, rights of or incidental to mining acquired or to be acquired under the Minerals Ordinance. Exhibit O next recites that, subject to the consent of the Governor being obtained, the Vendor has agreed to sell and assign the mining properties, when granted, to the company, thereinafter called the Purchaser. The consent of the Governor there mentioned is the consent required by section 13 of the Minerals Ordinance, which prohibits the lessee of a mining lease from assigning his lease or any portion of the rights or interests conferred thereby without the consent in writing of the Governor signified by endorsement on the instrument of assignment, and provides that "every such instrument shall be for all purposes null and void without the said endorsement". There is no such endorsement on Exhibit O. There follows the further recital that the Purchaser has agreed to complete the purchase and pay the purchase consideration upon the Vendor's executing an irrevocable power of attorney in favour of the Purchaser for the purpose of obtaining the Governor's consent to the transfer to the Purchaser of the mining properties when granted, and has agreed also to transfer and assign them to the Purchaser when the consent is obtained—that is, the Purchaser, the company, has agreed to transfer and assign them to itself. After this last recital, there follows the appointment of the company, thereinafter to be called the Attorney, but in fact still called the Purchaser as well, as the Syndicate's attorney "for it in its name and on its behalf"—that is, for and in the name and on behalf of the Syndicate or Vendor—"to do all such acts deeds matters and things as the said Attorney may consider requisite or necessary in connection with the transfer and assignment of the said Mining Properties when granted to the Purchaser"—that is, in connection with their transfer and assignment to itself, the company, when they have been granted—"and in connection with any matters or things arising thereout"—that is, arising out of the transfer—"or in connection with any rights or interests granted or to be granted in respect of the said Mining Properties to which the Vendor may be entitled".

Ejukorlem & Co. Ltd. v. C.I.M. Hurley, Ag S.P.J.

Up to that point, the intention of this instrument is simply to make the company the Syndicate's agent for effecting the tranfer to the company of the scheduled property and whatever rights or interests the Syndicate may have or may subsequently acquire in it. However, there follow a number of particular powers, some of which enlarge the effect of the instrument very greatly. First, there are powers which directly further and complement the power to transfer the properties. These are, a power to do everything necessary to complete the Syndicate's title to the properties and obtain all requisite consents to the transfer, and a power to take possession of the properties or the evidence of title to them and give receipts and discharges therefor. Next, there are powers to prosecute, defend, and arbitrate or settle proceedings and claims in connection with the properties; these are common form in powers of attorney of a general or comprehensive nature, but the granting of them is not foreign to the purpose of perfecting and transferring the Syndicate's title. Finally, there are powers which go far beyond that purpose. There is a power to "enter upon the Mining Properties and work, prospect, manage develop superintend and control the same" and to render all necessary reports and returns to Government, and a power to "appoint any employee overseer manager or clerk or other responsible person or persons in charge of the Mining Properties" for the purposes of the Minerals Ordinance and the regulations made under it and of any other relevant legislation. Most far-reaching of all, power is given to the company "for it and in its name and on its account"—the word "it" must denote the Syndicate, as it did in a similar expression used earlier—"to win sell rail ship realise or otherwise dispose of according to law all minerals won from the Mining Properties . . . . and to retain all proceeds of such realisation and disposal as its own absolute property without being in any way accountable to the Vendor directly therefor". That is, the company, in the Syndicate's name, may dispose of the minerals won on the properties, and may do so for its own benefit and without accounting to the Syndicate.

The power of attorney Exhibit O concludes with a declaration in the usual form that it is irrevocable. It is not, of course, executed by the company, but the company has tendered and relies upon it in these proceedings, and must therefore be held to the recital, which no attempt has been made to contradict or qualify, that it has agreed to pay the purchase price upon the execution of the power. An under-

taking to pay money is valuable consideration: Halsbury, 2nd Edition, Vol. 7, paragraph 196, note (*u*) at page 138. Under section 8 of the Conveyancing Act, 1882, acts done under a power of attorney given for valuable consideration, and in the instrument creating it expressed to be irrevocable, are valid in favour of purchasers, notwithstanding any act of the donor of the power, or his death, marriage, lunacy, unsoundness of mind or bankruptcy, and notwithstanding that the donee of the power or the purchaser has notice of any such matter. For conveyancers, accordingly, such a power is as effectual as a conveyance unless the donee dies without exercising it: Prideaux' Precedents in Conveyancing, 22nd Edition, Vol. 2, page 436, note. That view is clearly correct. Here, the power of attorney Exhibit O, given for valuable consideration and expressed to be irrevocable, does not, it is true, give the company a power of sale to third parties over the properties, but it confers power to transfer and assign them to the company, and in the meantime to go into possession and operate them and to sell and otherwise dispose of the minerals won, for the sole account of the company; and to that extent it takes effect as a conveyance of portion of the rights and interests conferred by the two leases. In particular, it is a conveyance of the minerals on the properties, and does not make the company the syndicate's agent in respect of those minerals, but a purchaser.

This defeats the company's contention that its possession of the minerals was lawful under section 66 (*d*) of the Ordinance because it was a duly authorised agent or employee of the Syndicate under the power of attorney. Mr Agbakoba, for the company, has abandoned that contention, recognising that the power of attorney does not make the company the Syndicate's agent. He rests his case on the other contention, and submits that the power of attorney gives the company rights and interests in and under the leases otherwise than by assignment, so that the company is a lessee by virtue of section 2 and its possession of the minerals was lawful under section 66 (*a*) as the possession of a lessee. For this ground to succeed it must be shown that Exhibit O, which undoubtedly takes effect as a conveyance, that is, operates to convey the properties, does not take effect as an assignment or operate to assign them, for if it operates to assign them it is void under section 13 for want of the Governor's consent and gives the company no right or interest in the properties whatever. On that, it might be thought enough to say that since Exhibit O operates as a conveyance of rights and interests in the leases it operates as an assignment, since an assignment

Ejukorlem & Co. Ltd. v C. I. M.

Hurley, Ag. S.P.J.

is the mode of conveyance appropriate to the transfer of leaseholds. However, there are ways of transferring leaseholds and interests in leaseholds otherwise than by assignment, and the question arises, whether Exhibit O may not amount to one of these other forms of conveyance. The word "assign" used in section 13 is not defined in the Ordinance. Its ordinary legal use, as a verb, is in reference to the transfer or conveyance of leaseholds and choses in action from one person to another *inter vivos*, and no doubt that is why it is used in the Ordinance where the transfer or conveyance of mining leaseholds or rights and interests in mining leaseholds is in question. "Assignment", in sections 2 and 13 of the Ordinance, denotes the act whereby such transfer or conveyance is effected; it can also mean the instrument expressing the act, but that is not its meaning in the sections. Transfers *inter vivos* of interests in leaseholds and choses in action can be effected without assignment by equitable mortgage or by declaration of trust, and in the case of leaseholds by sub-demise, while rights in regard to leaseholds can be conferred by licence. If Exhibit O operated in any of these ways it would not be an assignment; but it does not so operate. Clearly it is not a mortgage or a declaration of trust. It is not a sub-lease, for there is no reversion. It is not a licence, for it is unconditionally irrevocable and it confers a right to possession. This instrument, then, which takes effect as a conveyance, but is not a mortgage or declaration of trust or sub-lease or licence, must take effect as an assignment, and can operate only to assign the interests which it conveys.

That, indeed, is what it was intended to do, as can be seen when it is looked at as a whole. The Syndicate sells the properties to the company and, by means of Exhibit O, gives the company power to make the transaction legally effective and complete by obtaining the Governor's consent and assigning, and at the same time carries the deal to a conclusion, from a practical business point of view, by putting the company in possession with power to operate the properties for its own sole advantage. It is an attempt to get round the provisions of section 13 by giving the company what section 13 says shall not be assigned to it without the Governor's consent, a very substantial portion of the rights and interests conferred by the leases. The attempt fails, for what it amounts to, and what Exhibit O effects, is an assignment of the rights and interests in question, and the assignment is void for want of the consent.

Appeal dismissed.

REGINA *v* YAYIYE OF KADI KADI

[High Court (Reed J.) June 22, 1957]

[Maiduguri—Trial upon Information—No. JD/28C/1957]

Criminal Law and Procedure—Murder—Defence of Insanity—Law of Insanity in Nigeria considered—Section 28 Criminal Code—English law distinguished—Section 229 Criminal Procedure Ordinance.

Upon the trial of a charge of murder to which the defence was insanity—

Held:

(1) The Nigerian law of insanity is not the same as the law of England laid down in M'Naghten's case.

(2) In Nigeria, in order to establish insanity and overcome the presumption that every man is sane and accountable for his actions, the defence must prove (1) that the accused was suffering either from mental disease or from natural mental infirmity and (2) that that disease or infirmity was such that, at the relevant time the accused was, as a result, deprived of the capacity—

(*a*) to understand what he was doing; or

(*b*) to control his actions; or

(*c*) to know that he ought not to do the act or make the omission.

(3) Since it was "most probable" that the accused when he killed deceased was suffering either from mental disease or from natural mental infirmity which deprived him of the capacity to understand what he was doing, or to control his actions, the burden of proof laid upon the defence was discharged.

Per Curiam: Where the defence is one of partial delusion the provisions of section 28 of the Criminal Code apply.

Cases referred to:

M'Naghten's Case (1843), 10 Cl. and Fin. 200; 4 St. Tr.N.S. 847 distinguished;

R. v Omoni 12 W.A.C.A. 511 followed;

R. v Ashigifuwo 12 W.A.C.A. 389 applied;

R. v Echem 14 W.A.C.A. 158 applied.

Regina
v.
Yayiye
Reed, J.

[*Editorial Note.*—This case re-states for the Region what was laid down in the two cases of *R. v Ashigifuwo* 12 W.A.C.A. 389 and *R. v Omoni* 12 W.A.C.A. 511. These two cases in the West African Court of Appeal deal *in extenso* with what is needed in Nigeria for the defence of insanity to be made out. The burden of proof was first dealt with in the reports of the West African Court of Appeal with the case of *R. v Nasamu* 6 W.A.C.A. 74. In that case the finding of the judge amounted to this, that the accused "most probably did not know the nature of his act". This "probability" was held to discharge the burden laid upon the defence. This test of "probability" was adopted again in *R. v Ashigifuwo*. Absence of motive as evidence of insanity was first raised in the case of *R. v Inyang* 12 W.A.C.A. 5. There, the West African Court of Appeal, referring to the English case of *R. v Haynes* 1 F. and F. 666 said "When there is as much evidence indicative of insanity rather than the opposite as there was in this case, the absence of any evidence of motive may become relevant to the point at issue, and material to it". This statement was adopted in *R. v Ashigifuwo*. In *R. v Dim* 14 W.A.C.A. 154, absence of motive was held in that case not necessarily to be evidence of insanity.

In this case, Reed J. admitted evidence from the Village Head of the deceased's village. It was held in *R. v Inyang* that medical evidence is not essential to prove the defence of insanity, and that following the English cases of *R. v Tuchet* 1 Cox, C.C. 103 and *R. v Vyse* 176 E.R. 111 the evidence of ancestors or blood relations on this matter is admissible. *R. v Echem* 14 W.A.C.A. 158 deals with the question of "uncontrollable impulse", while *R. v Anuku* 6 W.A.C.A. 41 deals with the attitude of the West African Court of Appeal to the findings of the trial judge. *R. v Thamu of Guyuk* 14 W.A.C.A. 372 deals with the case of a person suffering from delusions. *R. v Wangara* 10 W.A.C.A. 236 deals with that standard of proof required by section 52 of the Criminal Code of the Gold Coast.]

TRIAL UPON INFORMATION

Nunan, Crown Counsel, for the Crown;

Eso for the prisoner.

Reed J.: Having dealt with other matters proceeded as follows:

The defence is that the accused was insane, as defined by section 28 of the Criminal Code, at the time he fired the arrow at the deceased. Before I deal with the facts of the case

before me I shall deal with the law. Nigerian law, as set out in section 28, is not the same as English law as laid down by the Judges in answer to the questions in M'Naghten's Case: see *Rex v Omoni* 12 W.A.C.A. 511. In Nigerian law the defence must prove, to establish insanity and to overcome the presumption that every man is sane and accountable for his actions, first that, at the relevant time, the accused was suffering either from mental disease or from natural mental infirmity and, secondly, that the mental disease, or natural mental infirmity, was such that, at the relevant time, the accused was, as a result, deprived of capacity:

(*a*) to understand what he was doing; or
(*b*) to control his actions; or
(*c*) to know that he ought not to do the act or make the omission.

If the defence is one of partial delusion, the provisions of the second paragraph of section 28 are applicable and are similar to the rules in *M'Naghten's Case.* In *Omoni's* case the words "natural mental infirmity" were defined as:

> "a defect in mental power neither produced by his own default nor the result of disease of the mind."

I now deal with the law as it affects the burden of proof of insanity. In *Rex v Ashigifuwo* 12 W.A.C.A. 390 it is stated:

> " . . . . this Court in *R. v Nasamu* 6 W.A.C.A. 74 and in *R. v Afonja* W.A.C.A. 22 February, 1947 (unreported) held that, if the facts proved by the defence were such as to make it 'most probable' that the accused by reason of mental disease or natural mental infirmity was deprived of his capacity to understand what he was doing or control his actions, then the defence has discharged the burden of proof required to establish the defence of insanity."

In *R. v Echem* 14 W.A.C.A. 158 it is stated at page 160:

> "We wish to point out that the burden of proof which rests upon an accused person to establish the defence of insanity is not as heavy as that which rests upon the prosecution when proving its case against an accused person. It may be stated as not being higher than the burden which rests on a plaintiff or defendant in civil proceedings."

Mere absence of any evidence of motive for a crime is not a sufficient ground upon which to infer insanity; but see *Rex v Ashigifuwo* (supra) at page 389 where it is stated:

> " . . . . as was pointed out by this Court in *R. v Inyang* 12 W.A.C.A. 5, when there is sufficient evidence indi-

Regina v Yayiye

Reed, J.

> cative of insanity rather than the opposite, 'the absence of any evidence of motive may become relevant to the point at issue and material to it'."

I have discussed the law as it affects the issue in the case now before me. I shall now deal with the facts. The evidence of insanity comes principally from accused's own evidence corroborated by the evidence of his Village Head, Bulama Brim, and the absence of motive. According to accused he was possessed, from time to time, of "evil spirits". He said that these evil spirits "come and punish me and then they go away." He said that he fired the arrows during one of these periods. He said "My head was dancing . . . . .I did not know what I was doing. It is not correct that I knew what I was doing and could not prevent myself doing it. . . . . I was not conscious when I fired the arrows". Bulama Brim said that accused was absent from his village, Kadi-Kadi, for many years and then returned about twenty days before the incident. Witness said:

> "He was not in his right mind. He talked too much. He used to make fires. He used to tie up bundles of logs and leave them here and there and used to make fires."

Witness went on to say that the villagers tied up accused and gave him medicine to make him better. One night he escaped. It was shortly after this that accused fired the arrow which killed deceased.

There is no motive. Accused came to a village where he was a complete stranger, fired arrows at people in the village and ran away.

Finally there is some evidence that accused's behaviour was abnormal while he was in prison at Gashua following his arrest.

On the other hand accused has been under observation by a registered medical practitioner, Dr Simpson, since April and shown no mental abnormality. The doctor told the Court that mental patients do not normally recall what has taken place during the period of mania. But after hearing the evidence tendered by the defence in support of insanity the doctor said accused might have been suffering from a condition of mania and said that certainly such patients would make definite attacks on other persons. I have summarised the evidence on this issue of insanity. I accept the evidence of Bulama Brim. Having regard to the burden of proof of insanity, which I have already defined, the Court must, in my view, find that the defence have discharged that burden.

In my view it is "most probable" that accused, when he fired the arrow at deceased, was suffering either from mental disease or from natural mental infirmity which deprived him of capacity to understand what he was doing or to control his actions.

Accordingly I find proved that accused committed the act alleged but I find him Not Guilty of murder on the ground of unsoundness of mind when he committed the act. Section 229 of the Criminal Procedure Ordinance refers. It is ordered that accused be kept in custody and that the case be reported for the order of the Governor.

Order made under section 229
Criminal Procedure Ordinance

J. O. IPHIE *v* PLATEAU AUDITING COMPANY

[C. A. (Bairamian, S.P.J., Hurley, J.) January 4, 1957]

[Jos—Civil Appeal No. 110A/1956]

Evidence—Documents and secondary evidence thereof—Section 96 (1) (*a*) *Evidence Ordinance—Section* 97 *and proviso* (*b*) *thereto—Notice to produce—Position where defendant denies contract.*

Practice and Procedure—Defence in Magistrate's Court—Need for detailed defence—Magistrates' Courts (*Northern Region*) *Rules*, 1955, *Order XXII*, *rule* 1.

The plaintiff sued for a balance of salary as an accountant engaged by the defendant; at the hearing, counsel for the defendant merely said "claim disputed".

The plaintiff gave evidence that the defendant engaged him orally to check the monthly accounts of his tavern and that he sent to the defendant a letter of acceptance a copy of which he tendered. Objection was made that no notice to produce the original had been given, but the magistrate received the document, apparently under proviso (*b*) to section 97 Evidence Ordinance. The plaintiff further gave evidence that the defendant had paid him money three times in payment for his services and he tendered the counterfoils of his receipt book in evidence. A further objection was made. It was over-ruled, apparently under the same proviso.

The defendant gave evidence denying any contract with the plaintiff and denying any knowledge of the letter of acceptance and of the receipts.

The magistrate in his judgment said he thought that the copy of the letter of acceptance and the counterfoils were genuine, but he made no finding that the originals reached the hands of the defendant. He gave judgment for the plaintiff. The defendant appealed.

Held:

(1) Before secondary evidence of a document can be given a case must be made out under section 96 Evidence Ordinance; but in the present suit the plaintiff did not give any evidence to show that his letter of acceptance and receipts reached the hands of the defendant.

(2) Proviso (*b*) to section 97 Evidence Ordinance relates to a case where the document forms the basis of the action so that the action itself acts as a notice—which was not the case either in regard to the letter of acceptance or to the receipts.

Obiter: The convenient course in a case like the present one is to admit the copies provisionally when the plaintiff is giving evidence, provided that the evidence raises a *prima facie* case that the originals reached the defendant's hands, and after hearing the evidence for the defendant decide whether the originals were received by the defendant or not, and treat the copies accordingly.

Per Curiam: A defendant ought to be made to state his defence in some detail, and not merely deny the claim.

[Editor's Note: see *Coker v Farhat*, 14 W.A.C.A. 216 on secondary evidence.]

CIVIL APPEAL FROM MAGISTRATE

Agbakoba for the appellant.

Eso for the respondent.

Bairamian, S.P.J. (delivering the judgement of the court): The respondent is a business name for one Chukuzaku Omezi who sued on a claim for "balance of salary payable by the defendant for work done and services rendered by the plaintiff-firm, as an accountant for the defendant at his request" with these particulars:

July 1954 Balance due: £1-0*s*-0*d*

August 1, 1954, to March 31, 1955, at £3 per month: . . . . . £24-0*s*-0*d*.

Giving evidence Omezi said this:

"I know Mr J. O. Iphie, the defendant. He employed me as an accountant-auditor to check his bar record books at monthly intervals: they were the books of the Wayside Inn. This was discussed in April, 1954, and took effect in May, 1954. I was to go to his bar, take stock and check the bar clerk's records. This agreement was discussed orally; when I got to my office I put an acceptance in writing which was sent to defendant. I produce the copy. I tender it."

Mr Agbakoba for the defendant objected on the ground that no notice to produce had been served; the learned magistrate ruled that the copy was admissible. The plaintiff continued:

"I was paid at a rate of £3 per month in May, June and part July. I issued receipts for these sums."

Iphie v Plateau Auditing Co.

Bairamian, S.P.J.

Mr Agbakoba again objected that the plaintiff could not put in the counterfoils of his receipt book, but he was overruled; the note reads—"again I rule that these duplicates are admissible for what they are worth". In the judgment it is said that these "copies", which the learned magistrate assumes to be genuine, "are rendered admissible by the proviso to section 97 (of the Evidence Ordinance); from the nature of the case the defendant must have known that he could be required to produce the originals, therefore notice to produce is not required and the secondary evidence is rendered admissible".

It would seem that the learned magistrate was relying on proviso (*b*) to section 97 of the Evidence Ordinance, which reads—

"when from the nature of the case, the adverse party must know that he will be required to produce it"

—which is a case in which there is no need to give notice to produce. Mr Agbakoba has argued that proviso (*b*) relates to a case where the document is directly in issue: in other words, where the document forms the basis of the action so that the action itself acts as a notice (as it is put in Halsbury's Laws of England, 2nd ed., vol. 13, at p.652) "as when the action is in trover for the document, or in contract for non-delivery of the document, or in a prosecution for larceny of the document" (at that page). To the same effect is Phipson on Evidence, 8th ed., at p.535, which puts it thus: "Where, from the nature of the case, the adversary must know that he will be charged with the possession of the instrument". It would seem that proviso (*b*) to the local section 97 was meant to embody the above rule of the common law; and in so far as the documents marked A, B, C, and D—we mention B, C, and D besides, for they are on a par with A—in so far as they were admitted under proviso (*b*) we think that they were wrongly admitted; and this is conceded by Mr Eso, the learned Counsel for the respondent.

That, however, was not the real point. The real point would have become apparent if the learned magistrate had not been content with a statement by counsel for the defendant which was no more than this—"Claim disputed". We recommend a little more attention to Order 22, rule 1, of our Magistrates' Courts (Northern Region) Rules, 1955; a defendant ought to be made to say more, particularly when he is represented by counsel. In this case the defendant would have said, as he did in his evidence, that he never engaged the plaintiff to do his Wayside Inn accounts. The defendant's attitude was that he never received any such letter as A, or any

such receipts as the plaintiff alleged, who said that he had three payments, one of £3, another of £3, and a third of £2, for which he sent receipts to the defendant out of a counterfoil book and of which he was allowed to produce the counterfoils (B, C, and D).

It is useful here to point out that section 97 of the Evidence Ordinance, which provides rules on notice to produce, refers to para. (*a*) of sub-section (1) of section 96, which reads—

> "(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—
>
> (*a*) when the original is shown or appears to be in the possession or power—
>
> (*i*) of the person against whom the document is sought to be proved; or
>
> (*ii*) of any person legally bound to produce it; and when, after the notice mentioned in section 97, such person does not produce it."

In view of the defendant's evidence, the real question was whether he had received a letter of acceptance and the receipts which the plaintiff said he sent. To say, as the learned magistrate said, that they were genuine does not meet the point, which was whether the defendant had received them: if he had received them and, in spite of his never having engaged the plaintiff, he did not thereupon repudiate them, the palintiff could then claim that the defendant by his conduct admitted the engagement. In the absence of a finding that the defendant received them, secondary evidence could not have been entertained, or, to be more precise, it was of no value. Notice to produce does not get over the point, in a case like this, of the need to show that the original was received by the defendant.

We make these observations for future guidance in this case. It is necessary to investigate further as to how the letter of acceptance was sent to the defendant and how the receipts; the magistrate who retries this case is desired to consider and make a finding on whether he is satisfied that the defendant did receive the letter and the receipts before he relies on them. There is no harm in admitting A, B, C, and D provisionally when the plaintiff is giving evidence, provided the evidence raises a *prima facie* case that the originals reached the defendant's hands; the defendant will be at liberty to rebut by evidence that *prima facie* case; and the

Iphie v Plateau Auditing Co.

Bairamian, S.P.J.

magistrate can decide at the end of the hearing the question whether the defendant did receive the originals, and, if he does so decide, then he can look at the copies and make use of them as evidence, or disregard them completely if he decides otherwise. This seems to be the convenient method of dealing with the matter where one is sitting without a jury: see Phipson, 8th ed., p.9.

(The learned Judge then proceeded to deal with the evidence and the accounts.)

Judgment set aside and new trial ordered before another magistrate.

LAW REPORTS

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THE HIGH COURT
of the
NORTHERN REGION OF NIGERIA
1958

Hon. Sir Thomas Algernon Brown, Chief Justice
Hon. Mr Justice Hurley, Senior Puisne Judge
Hon. Mr Justice Smith, Judge
Hon. Mr Justice Reed, Judge
Hon. Mr Justice Bate, Judge

THE LAW REPORTING COMMITTEE
of the
NORTHERN REGION
OF NIGERIA
1958

Hon. The Chief Justice, *ex-officio*, Chairman
Ian McLean, Esquire, Crown Counsel*
Kayode Eso, Esquire, Barrister-at-Law

*Resigned 14th July, 1958

INDEX OF REPORTED CASES

CASES JUDICIALLY CONSIDERED

Aburime *v* The Secretary Assemblies of God Mission Ewu Ishan and anor. 14 W.A.C.A. 185; Followed Laniyan *v* Isaac (1958) N.R.N.L.R. 119.

Akpiri *v* West African Airways Corporation 14 W.A.C.A. 195: *Distinguished* Balogun *v* United Africa Company and anor. (1958) N.R.N.L.R. 77.

Al-Hassan *v* Commissioner of Police 10 W.A.C.A. 238: *Considered* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42.

Attorney-General *v* Goddard (1929) 98 L.J.K.B. 743: *Applied Ezebuiro v* Commissioner of Police (1958) N.R.N.L.R. 84.

Awuah *v* Commissioner of Police 13 W.A.C.A. 1: *Referred to* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42: *applied* Amaechi *v* Commissioner of Police 123.

Biobaku *v* Police XX N.L.R. 30: *Applied* Ezebuiro *v* Commissioner of Police (1958) N.R.N.L.R. 84.

Bird *v* Cocking (1951) 2 T.L.R. 1260; (1952) W.N. 5 (C.A.) *Observations of Birkett, L.J. referred to* Salihu *v* Tin and Associated Minerals Limited and Others (1958) N.R.N.L.R. 99.

Bonham *v* Zurich General Accident and Liability Assurance Company Limited (1945) K.B. 292; (1945) 1 A.E.R. 427: *Applied* Commissioner of Police *v* Momo Garko (1958) N.R.N.L.R. 70.

Chiedu *v* Inspector-General of Police (1956) N.R.N.L.R. 69: *Considered* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42.

Colonial Sugar Refining Company Limited *v* Irving (1905) A.C. 369: *Followed* Abubakar Mohamed Bida *v* Zaria Native Administration (1958) N.R.N.L.R. 16.

Conway *v* George Wimpey and Company Limited (1951) 2 K.B. 266; (1951) 1 A.E.R. 363: *Cited* Commissioner of Police *v* Momo Garko (1958) N.R.N.L.R. 70; *referred to* Salihu *v* Tin and Associated Minerals Ltd. and Others (1958) N.R.N.L.R. 99.

Cull *v* Blackhouse (1793) 123 E.R. 990: *Followed* Holt and Company (Liverpool) Limited *v* Jafa'aru (1958) N.R.N.L.R. 29.

Daddo *v* Bauchi Native Authority (1958) N.R.N.L.R. 82: *Followed* Abdusalami Nagogo *v* Kano Native Authority (1958) N.R.N.L.R. 115.

Davies *v* Director of Public Prosecutions (1954) A.C. 378; 38 Cr. App. R. 11 (1954) 2 W.L.R. 343; (1954) 1 A.E.R. 507: *Adapted to Nigeria and applied* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42.

De Vries *v* Smallridge (1928) 1 K.B. 482: *Applied* Oyene *v* Abogu (1958) N.R.N.L.R. 103.

Duru *v* Gumel Native Authority (1957) N.R.N.L.R. 151: *Applied* Ogoja *v* Adamawa Native Authority (1958) N.R.N.L.R. 35.

Ebute *v* Inspector General of Police (1957) N.R.N.L.R. 194: *Considered* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42.

Flint *v* Lovell (1935) 1 K.B. 360: *Applied* Agwazim *v* Nwadiaju (1958) N.R.N.L.R. 25.

Garba Dan Ibani *v* Kano Native Authority (1958) N.R.N.L.R. 61: *Disapproved and not followed* Abdusalami Nagogo *v* Kano Native Authority (1958) N.R.N.L.R. 115.

Gwilliam *v* Twist (1895) 1 Q.B. 557: *Cited* Commissioner of Police *v* Momo Garko (1958) N.R.N.L.R. 70.

Igiokwe *v* Nanna XVII N.L.R. 5: *Followed* Commissioner of Police *v* Momo Garko (1958) N.R.N.L.R. 70; *referred to* Oyene *v* Abogu (1958) N.R.N.L.R. 103.

Kemavor *v* Commissioner of Police 7 W.A.C.A. 198: *Distinguished* Omaku *v* Igbirra Native Authority (1958) N.R.N.L.R. 11.

Limpus *v* London General Omnibus Company 32 L.J. Ex. 34; 11 W.R. 149: *Cited* Commissioner of Police *v* Momo Garko (1958) N.R.N.L.R. 70.

Lloyd *v* Jones (1848) 6 C.B. 81: *Applied* Laniyan *v* Isaac (1958) N.R.N.L.R. 119.

Lockwood *v* Abdy (1945) 66 R.R. 621: *Applied* Holt and Company (Liverpool) Limited *v* Jafa'aru (1958) N.R.N.L.R. 29.

Mai Rai *v* Bauchi Native Authority (1957) N.R.N.L.R. 115: *Applied* Shehu Dan Hazo Fagawa *v* Kano Native Authority (1958) N.R.N.L.R. 64.

Mamman Durbawa *v* Gwandu Native Authority (1958) N.R.N.L.R. 21: *Referred to* Abdusalami Nagogo *v* Kano Native Authority (1958) N.R.N.L.R. 115.

Mamman Tungar Maizabo *v* Sokoto Native Authority (1957) N.R.N.L.R. 133 (F.S.C.): *Considered* Mamman Durbawa *v* Gwandu Native Authority (1958) N.R.N.L.R. 21.

Midland Insurance Company *v* Smith (1881)6 Q.B.D. 561: *Followed* Nsude *v* Anigbo (1958) N.R.N.L.R. 96.

Mulready *v* Bell (1953) 2 Q.B. 117; (1953) 3 W.L.R. 100; (1953) 2 A.E.R. 215: *Considered* Salihu *v* Tin and Associated Minerals Limited (1958) N.R.N.L.R. 99.

Mutual Aid Society *v* Ogonade (1957) N.R.N.L.R. 118: *Referred to* Koya *v* Zawan (1958) N.R.N.L.R. 1.

Nzegwu *v* Police XX N.L.R. 163: *Distinguished* Ezebuiro *v* Commissioner of Police (1958) N.R.N.L.R. 84.

Ogoja *v* Adamawa Native Authority (1958) N.R.N.L.R. 35: *Applied* Dzakpe *v* Tiv Native Authority (1958) NR.N.L.R. 135.

Okeke *v* Commissioner of Police 12.W.A.C.A.6: 33 *Considered* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42.

Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42: *Affirmed* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 50 (F.S.C.)

Owu *v* Commissioner of Police 13 W.A.C.A. 103: *Applied* Amaechi *v* Commissioner of Police(1958) N.R.N.L.R. 123.

Oyene *v* Abogu (1958) N.R.N.L.R. 103: *Distinguished* Maina Kolo *v* Zakari Chidawa (1958) N.R.N.L.R. 131.

Rabo Maroki *v* Kano Native Authority (1956) N.R.N.L.R. 5: *Followed* Omaku *v* Igbirra Native Authority (1958) N.R.N.L.R. 11.

Reading *v* Attorney-General (1951) 1 A.E.R. 617: *Applied* Ezebuiro *v* Commissioner of Police (1958) N.R.N.L.N.R. 84.

R. *v* Adelabu (1955-56) W.R.N.L.R. 111: *Referred to* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42.

R. *v* Anyaleme 9 W.A.C.A. 23: *Considered* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42.

R. *v* Cheshire County Court Judge and the United Society of Boilermakers. Ex parte Malone. (1921) 2 K.B. 694: *Applied* Oyene *v* Abogu (1958) N.R.N.L.R. 103.

R. *v* Dare, 5 W.A.C.A. 122: *Considered* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42.

R. *v* Eze, XIX N.L.R. 110: *Applied* R. *v* Maina Waziri (1958) N.R.N.L.R. 91.

R. *v* George, IV N.L.R. 5: *Considered* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42.

R. *v* Lobell (1957) 1 Q.B. 547; (1957) 2 W.L.R. 525; 41 Cr. App. R. 100; (1957) 1 A.E.R. 734: *Applied* R. *v* Onyeamaizu (1958) N.R.N.L.R. 93.
R. *v* Manchester Legal Aid Committee. Ex parte Brand. (1952) 2 Q.B. 413: *Referred to* Okakpu *v* Resident, Plateau Province, (1958) N.R.N.L.R. 5.
R. *v* Metropolitan Police Commissioner. Ex parte Holloway. (1911) 2 K.B., 1131: *Referred* to Okakpu *v* Resident, Plateau Province (1958). N.R.N.L.R. 5.
R. *v* Metropolitan Police Commissioner. Ex parte Parker. (1953) 2 A.E.R. 717: *Followed* Okakpu *v* Resident, Plateau Province (1958) N.R.N.L.R. 5.
R. *v* Smith (1837) 8 C. and P. 160: *Direction of Bosanquet, J. doubted* R. *v* Onyeamaizu (1958) N.R.N.L.R. 93.
R. *v* Usuman Pategi (1957) N.R.N.L.R. 47: *Considered* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42.
Salt *v* MacKnight (1947) S.C.(J.) *Cited* Commissioner of Police *v* Momo Garko (1958) N.R.N.L.R. 70.
Smith and wife *v* Selwyn (1914) 3 K.B. 98: *Distinguished* Nsude *v* Anigbo (1958) N.R.N.L.R. 96.
Toriola *v* Arewa 12 W.A.C.A. 505: *Followed* Oyene *v* Abogu (1958) N.R.N.L.R. 103; *and* Maina Kolo *v* Zakari Chidawa (1958) N.R.N.L.R. 131.
Twine *v* Beans Express Limited (1946) 1 A.E.R. 202: *Cited* Commissioner of Police *v* Momo Garko (1958) N.R.N.L.R. 70.
Umaru Mafindi *v* Bauchi Native Authority (1956) N.R.N.L.R. 41: *Applied* Ogoja *v* Adamawa Native Authority (1958) N.R.N.L.R. 35.
White, Son and Pill *v* Stennings (1911) 2 K.B. 418: *Applied* Raccah *v* Wahab (1958) N.R.N.L.R. 58.
Wyatt *v* Guildhall Insurance company Limited (1937) 1 K.B. 633: *Applied, observations of Branson, J. referred to* Commissioner of Police *v* Momo Garko (1958) N.R.N.L.R. 70.
Yusufu Tudun Wada *v* Inspector General of Police (1957) N.R.N.L.R. 1: *Considered* Osidola *v* Commissioner of Police (1958) N.R.N.L.R. 42.

ORDINANCES AND LAWS OF NIGERIA JUDICIALLY CONSIDERED

Criminal Code (Cap. 42)

s. 1 (1958) N.R.N.L.R. 110.
s. 100 (1958) N.R.N.L.R. 123.
s. 112(1) (1958) N.R.N.L.R. 123.
s. 286 (1958) N.R.N.L.R. 93.
s. 390(5) (1958) N.R.N.L.R. 85.

Criminal Procedure Ordinance (Cap. 43)

s. 118(2) (1958) N.R.N.L.R. 3.
s. 158 (1958) N.R.N.L.R. 91.
s. 340 (1958) N.R.N.L.R. 91.

Goldsmiths Ordinance (Cap. 81)

s. 6(1) (1958) N.R.N.L.R. 5.

Land and Native Rights Ordinance (Cap. 105)

s. 21 (1958) N.R.N.L.R. 103.
(1958) N.R.N.L.R. 131.
s. 21(4) (1958) N.R.N.L.R. 119.

Magistrates' Courts (Northern Region) Law, 1955

s. 18(1)(*d*) (1958) N.R.N.L.R. 103.
(1958) N.R.N.L.R. 131.

INDEX OF SUBJECT MATTER

False information to a public officer contrary to section 125A Criminal Code—Whether a returning officer appointed under regulation 71 of the Northern House of Assembly (Elected Members) Electoral Regulations, 1956, is a 'person employed in the public service' as defined in s.1 Criminal Code.

Aduku *v* Commissioner of Police
(1958) N.R.N.L.R. 110 (C.A.)

Homicide—Burden of proof—Self defence—Provocation.

R. *v* Onyeamaizu (1958) N.R.N.L.R. 93 (Brown C. J.)

Homicide—Provocation—Burden of proof.

R. *v* Onyeamaizu (1958) N.R.N.L.R. 93 (Brown, C. J.)

Homicide—Self defence—Burden of proof—'Reasonable apprehension of death or grievous harm'—Whether apprehension 'reasonable'.

R. *v* Onyeamaizu (1958) N.R.N.L.R. 93 (Brown, C. J.)

Public officer receiving money to show favour under s.100 Criminal Code—Whether evidence is required of ability to influence—False pretence contrasted—Application of power of High Court under s.48 (*a*) (*ii*) of the Northern Region High Court Law, 1955.

Amaechi *v* Commissioner of Police
(1958) N.R.N.L.R. 123 (C.A.)

Receiving money corruptly under s.112 (1) Criminal Code—Whether evidence of ability to influence required—Application of powers of High Court under s.48 (*a*) (*ii*) Northern Region High Court Law, 1955.

Amaechi *v* Commissioner of Police
(1958) N.R.N.L.R. 123 (C.A.)

DAMAGES

Personal injuries—Quantum—Relationship of quantum to be awarded in Nigeria to quantum awarded in England.

Salihu *v* Tin and Associated Minerals Limited
(1958) N.R.N.L.R. 99 (Reed, J.)

DEFAMATION *see* SLANDER

ELECTION OFFENCES *see* CRIMINAL LAW AND PROCEDURE

EVIDENCE—Illiterates Protection Ordinance (Cap. 88)—Section 3 thereof—Object of ordinance—Bound under seal in name of the defendant who affixed his thumbprint thereto—Prima facie evidence of illiteracy—No endorsement as required by s.3 of Ordinance—Effect upon validity of bond.

United Africa Company Limited *v* Edems and Ajayi
(1958) N.R.N.L.R. 33 (Smith, J.)

EXECUTION *see* PRACTICE AND PROCEDURE

LAND CASES

Jurisdiction of High Court therein—Claim for recovery of possession of land held under a certificate of occupancy—Whether action raising issue of title to land—Whether defence raising *bona fide* claim of title—Section 21 (4) Land and Native Rights Ordinance (Cap. 105)—Whether plaintiff subject to the jurisdiction of the native court—Yoruba residing in the

Western Region—Section 15 (1) Native Courts Law, 1956—Sections 15 (1) (*a*) and 15 (1) (*c*) thereof.

Laniyan *v* Isaac (1958) N.R.N.L.R. 119 (C.A.)

Jurisdiction of Magistrates' Courts therein—Suit for declaration of title to land—Land held under certificate of occupancy—Section 21 Land and Native Rights Ordinance (Cap. 105)—Section 18 (1) (*d*) thereof—Magistrates' Courts (Northern Region) Law, 1955—Section 18 (3) thereof.

Oyene *v* Abogu (1958) N.R.N.L.R. 103 (C.A.)

Jurisdiction of Magistrates' Courts—Claim for declaration of title to land or for possession of land held under a statutory right of occupancy granted by a native authority—Section 21 Land and Native Rights Ordinance (Cap. 105)—Section 18 (1) (*d*) and section 18 (3) Magistrates' Courts (Northern Region) Law, 1955—Power of transfer under section 32 (2) Native Courts Law, 1956.

Maina Kolo *v* Zakari Chidawa
(1958) N.R.N.L.R. 131 (C.A.)

LANDLORD AND TENANT

Claim for possession of premises and damages for ejectment—Whether plantiff tenant or mere licensee—Operator of petrol installation—Construction of agreement.

Balogun *v* United Africa Company Ltd.
(1958) N.R.N.L.R. 77 (Reed, J.)

MINERALS

Definition of 'tailing' in section 2 of the Minerals Ordinance (Cap. 134)—Definition of 'Controlled mineral' in section 65 thereof.

Onojasi *v* Commissioner of Police
(1958) N.R.N.L.R. 56 (C.A.)

MOSLEM LAW OF HOMICIDE

Confession of accidental killing—Moslem court considering this as confession of intentional homicide—High Court not of this opinion and allowing appeal.

Garba Dan Ibani *v* Kano Native Authority
(1958) N.R.N.L.R. 61 (C.A.)

Confession of intention to beat—Death ensuing—Whether intention to beat amounts to intention to kill.

Daddo *v* Bauchi Native Authority
(1958) N.R.N.L.R. 82 (C.A.)

Confession of intention to beat—Whether further neccessity of *kasama* oaths—Nature of wounds—Wounds that must in the ordinary course of nature cause death.

Daddo *v* Bauchi Native Authority
(1958) N.R.N.L.R. 82 (C.A.)

Confession to striking—Evidence of two witnesses as to wounds—Cause of death—Wounds not such as likely to cause death—Neccessity for *kasama* oaths.

Abdusalami Nagogo *v* Kano Native Authority
(1958) N.R.N.L.R. 115 (C.A.)

Confession to wounding—Evidence of two witnesses as to intent—Death occurring after an interval—Neccessity for *kasama*.

Mamman Durbawa *v* Gwandu Native Authority
(1958) N.R.N.L.R. 21 (C.A.)

Confession made before court of trial—Conviction following upon confession—Retraction of confession upon appeal—Whether rules as to retraction of confession apply to preceedings upon appeal.

Kano Native Authority *v* Marka Yar Jatau Cula
(1958) N.R.N.L.R. 112

Lauth—Confession of intention to beat followed by evidence of wounds not likely to cause death.

Daddo *v* Bauchi Native Authority
(1958) N.R.N.L.R. 82 (C.A.)

Lauth—Confession to striking—Evidence of two witnesses as to intent—Wounds not likley to cause death.

Abdusalami Nagogo *v* Kano Native Authority
(1958) N.R.N.L.R. 115 (C.A.)

Lauth—Confession to wounding—Death occurring after an interval.

Mamman Durbawa *v* Gwandu Native Authority
(1958) N.R.N.L.R. 21 (C.A.)

Lauth—Evidence of one witness only—Neccessity for oath to complete the testimony followed by the *kasama* oaths.

Shehu Dan Hazo Fagawa *v* Kano Native Authority
(1958) N.R.N.L.R. 64 (C.A.)

Lauth—*Kasama* oaths—Form of—Intent in.

Mamman Durbawa *v* Gwandu Native Authority
(1958) N.R.N.L.R. 21 (C.A.)

Several persons committing a homicide—Position where no conspiracy—Liability of striker of the more serious blows.

Shehu Dan Hazo Fagawa *v* Kano Native Authority
(1958) N.R.N.L.R. 64 (C.A.)

NATIVE COURTS

Appeal from native court to High Court—Criminal appeal—English rules of evidence and procedure not observed in native court—Principles upon which High Court acts—Unwritten native law and custom administered in native court—Procedure in native court—Whether assessors required High Court—Presumption that procedure was in accordance with native law and custom.

Omaku *v* Igbirra Native Authority
(1958) N.R.N.L.R. 11 (C.A.)

Appeal from native court to High Court—Moslem court of first instance—s.62 (2) Native Courts Law, 1956.

Okolie *v* Ibo
(1958) N.R.N.L.R. 89 (C.A.)

Appeal from native court to High Court—Section 34 Native Courts Law, 1955—meaning of "any course with regard to the cause or matter which it considers that justice requires"—duty of native court to which the case is transferred.

Appellant convicted of offence other than offence which he was charged—contrary to natural justice.

Saanyam Dzakpe *v* Tiv Native Authority
N.R.N.L.R. 135 (C.A.)

Appeal from native court to High Court—Jurisdiction of High Court—Whether appeal lies to High Court or to Moslem Court of Appeal—Whether case governed by Moslem law—Native Courts Law, 1956—ss.20 (1) (*a*), 21, 62 (1) and 62 (2).

Ogoja *v* Adamawa Native Authority
(1958) N.R.N.L.R. 35 (C.A.)

PRACTICE AND PROCEDURE

Civil proceedings—Evidence disclosing felony—Whether Magistrate should stay proceedings pending prosecution.

Nsude *v* Anigbo
(1958) N.R.N.L.R. 96 (C.A.)

Execution—Immovable property—Evidence and denial that judgment debtor owns specific immovable property—Whether neccessary to investigate title—Sheriffs and Civil Process Ordinance (Cap. 205)—section 43—Judgments (Enforcement) Rules—O. IV. r.16 (2), O. V. r.3., O. VI.

Koya *v* Zawan
(1958) N.R.N.L.R. 1

Garnishee proceedings—Application in High Court Kano for order against garnishee in Maiduguri—Omission from applicant's affidavit of paragraph corresponding to paragraph 4 of Form 25 of the Schedule to the Sheriffs and Civil Process Ordinance (Cap. 205)—Venue—Judgments (Enforcement) Rules—O. VIII—r.2.

Raccah *v* Wahab
(1958) N.R.N.L.R. 58 (Bate, J).

High Court—Transfer between judicial divisions—Northern Region High Court Law, 1955—s.73—Supreme Court (Civil Procedure) Rules, —O.VII rr. 5 and 6.

Stephen *v* Pedrocchi
(1958) N.R.N.L.R. 51 (Hurley, Ag. C. J.)

Magistrates Court—Answer or defence to plaint—Magistrates' Courts (Northern Region) Rules, 1955—O. XXII r.1—Judgment in party's absence—Setting aside for new trial—Magistrates Courts (Northern Region) Law, 1955—Section 79.

Agwazim *v* Nwadiaju
(1958) N.R.N.L.R. 25 (C.A.)

Magistrates Court—Slander—Words set out in plaint in substance but not verbatim—O. II r.1 Magistrates' Courts (Northern Region) Rules, 1955—O. III r.1—O. XIV—Section 54 Northern Region High Court Law, 1955.

Ateze *v* Alhaji Momo
(1958) N.R.N.L.R. 127 (C.A.)

ROAD TRAFFIC

Disqualification—Appeal against an order disqualifying appellant from holding a licence—Circumstances in which such an order is appropriate.

Akanbi *v* Commissioner of Police
(1958) N.R.N.L.R. 80 (C.A.)

Stage carriage—Definition thereof in s.2 Road Traffic Ordinance, 1947—whether carrying a passenger for hire or reward upon one occasion only

brings vehicle within definition—Section 5 (*a*) Motor Vehicles (Third Party Insurance) Ordinance (Cap. 139) contrasted with section 35 (4) Road Traffic Act, 1930.

Commissioner of Police *v* Momo Garko
(1958) N.R.N.L.R. 70 (C.A.)

SLANDER

Practice and procedure—Contents of plaint in Magistrate's Court.

Ateze *v* Alhaji Momo
(1958) N.R.N.L.R. 127 (C.A.)

STATUTES

Construction—Appeal from court established under repealed statute—Jurisdiction—Section 86 Native Courts Law, 1956.

Abubakar Bida *v* Zaria Native Authority
(1958) N.R.N.L.R. 16 (C.A.)

TORT

Slander—Practice and procedure in Magistrate's Court—Contents of plaint.

Ateze *v* Alhaji Momo
(1958) N.R.N.L.R. 127 (C.A.)

False imprisonment—No arrest or other form of restraint.

Ateze *v* Alhaji Momo
(1958) N.R.N.L.R. 127 (C.A.)

S. A. KOYA *v* KOLOJA ZAWAN

[High Court (Reed J.) August 1, 1957]

[Jos—Motion JD/M8/1957]

Execution—Immovable property—Evidence and denial that judgment debtor owns specific immovable property—Whether necessary to investigate title—Sheriffs and Civil Process Ordinance, Cap. 205, s. 43—Judgments (Enforcement) Rules, O. IV, r. 16 (2)/ O. V, r.3; O. VI.

Upon application for leave to levy execution against the immovable property of a judgment debtor, the judgment creditor averred that the judgment debtor owned a particular house. Counsel for the judgment debtor stated that the judgment debtor no longer owned the house, but did not oppose the application.

Held: It was unnecessary to inquire into the title to the house before making the order sought.

Per curiam:

(1) It is preferable to word a motion in the same terms as the order sought.

(2) Upon an application for a writ of attachment and sale against the immovable property of a judgment debtor it is not necessary to aver that the judgment debtor owns specific immovable property.

Case referred to:

Mutual Aid Society Ltd. v Ogunade 1957 N.R.N.L.R. 118 mentioned.

CIVIL MOTION

Eso for the judgment creditor;

Agbakoba for the judgment debtor.

Reed, J. (delivering the judgment of the Court): This is an application by the judgment creditor for an order "for leave to levy execution against the immovable property of the judgment debtor." In his affidavit in support, the judgment creditor has averred that the judgment debtor owns "a house situate at No. 11 Star Road, Bukuru." Counsel for the judgment debtor stated that the judgment debtor no longer owns this property, though he does not oppose the application. No other immovable property is mentioned in the affidavit

S. A. Koya v. Koloja Zawan

Reed, J.

and the question is whether, having regard to the mention of a specific property in the affidavit and the statement by counsel that this property does not belong to the debtor, I should inquire into the title before I make an order.

In my view I am not concerned with title at this stage of the proceedings. I have two comments with regard to the application. In the first place it would, I think, be preferable if the motion had been worded in the same terms as the order sought; that is to say that it would have been better if the motion were "for an order that a writ of attachment and sale should issue against the immovable property" instead of "for an order for leave to levy execution against the immovable property" of the debtor. In the second place it need not have been averred in the affidavit that the judgment debtor owned a specific property, 11 Star Road, Bukuru. In order to comply with section 43 of the Sheriffs and Civil Process Ordinance, the deponent should aver that "I am informed and verily believe that the judgment debtor is the owner of immovable property within the jurisdiction of the Court." Order IV, rule 16 (2) of the Judgments (Enforcement) Rules sets out other matters which must be dealt with in the affidavit (and see *Mutual Aid Society Ltd. v Ogunade* 1957 N.R.N.L.R. 118); if satisfied, the Court orders that a writ of attachment and sale should issue against the immovable property of the judgment debtor. The order is in accordance with form 38 of the first schedule to the Rules and is addressed to the sheriff and bailiffs of the court; it requires them to enter upon and attach the immovable property of the judgment debtor "wheresoever it may be found" and (but not until the expiration of fourteen days after the attachment) to sell the property. Order V of the Rules deals with attachment; by rule 3 a public notice, in form 41 of the schedule, must be posted in a conspicuous place on the land. If any person has a claim in respect of the attached property he informs the sheriff or bailiff (Order VI, rule 1) and thereafter the procedure is in accordance with Order VI. If the judgment creditor does not admit the claim, the sheriff applies to the court for the issue of a summons and the registrar enters interpleader proceedings. An interpleader summons is issued and it is when that summons is heard, and not until then, that the court decides the issue of title.

It is ordered as moved.

Application granted.

MAMUDA DANTATA *v* INSPECTOR-GENERAL OF POLICE

[High Court (Smith J.) August 7, 1957)
[Kano—Interlocutory Matter—K/M 20/1957]

*Criminal Law and Procedure—Bail—Bail pending trial—Reasons for refusing—Criminal Procedure Ordinance. s.*118 (2).

In the exercise of its discretion to grant bail to a person charged with felony the court has to consider the nature of the charge, the severity of the punishment and the character of the evidence, all of which are factors which may show whether the accused is likely to abscond.

An attempt by the accused to suppress evidence likely to incriminate him is a material ground against granting bail.

MOTION

Davies (*Nwajei* with him) for the applicant.

McLean, *Crown Counsel*, for the respondent.

Smith J.:—Last Saturday I refused an application made on behalf of the accused to be admitted to bail pending his trial and then stated I would give my reasons today.

On 23rd July the magistrate remanded the accused in custody. He is charged with knowingly being in possesion of 998 forged West African £5 notes without lawful authority or excuse; with knowingly being in possession of a plate upon which was engraved what purported to be the body of a West African £5 note and of four printing machines for printing West African currency notes, without lawful authority or excuse. These are offences contrary to section 8 (2) and 10 (2) (*c*) of the West African Currency Notes Ordinance which provide for a punishment of five and ten years imprisonment respectively. They are statutory felonies.

By section 118 (2) of the Criminal Procedure Ordinance a person charged with a felony other than a felony punishable with death may be granted bail if the court thinks fit. In the exercise of its discretion the court has to consider the nature of the charge, the severity of the punishment and the character of the evidence. The accused is charged with grave offences. The evidence before the magistrate on 22nd July was that the accused was found in possession of the notes, the plate and the printing machines alleged in the charge and also in possession

Dantata v. I. G. P. Smith, J.

of certain other specified forging materials. These factors alone make it undesirable to grant bail because of the likelihood that the accused may abscond.

The evidence given before the magistrate on 23rd July showed *prima facie* that after the accused was released on bail on the 22nd July the sources from which the police were receiving information dried up. It also disclosed that on 21st July the accused offered a police constable £18,000 if he would allow the accused to remove the handbag containing the notes alleged to be forged which was at that time in the police constable's custody. This latter evidence showed a deliberate attempt by the accused to get rid of important evidence which was likely to incriminate him. It was an attempt to interfere with the course of justice and the court is entitled to consider it as a material ground against granting bail. It would be wrong to allow bail to an accused who has clearly indicated his readiness to commit other offences in order to suppress evidence.

Application dismissed.

UDEKWE OKAKPU *v* RESIDENT, PLATEAU PROVINCE

[C.A. (Hurley Ag. C.J., Reed J.) September, 28 1957]

[Jos—Appeal No. JD/41CA/1957]

Administrative law—Goldsmiths—Revocation of goldsmith's licence—Whether Resident's power judicial or administrative—Goldsmiths Ordinance, Cap. 81, *s.* 6 (1).

A Resident's power to revoke a goldsmith's licence under section 6 (1) of the Goldsmiths Ordinance is an administrative power in the exercise of which he is not required to act judicially.

Cases referred to:

R. v Metropolitan Police Commissioner: Ex parte Parker [1953] 2 All E.R. 717 followed;

R. v Metropolitan Police Commissioner: Ex parte Holloway [1911] 2 K.B. 1131 mentioned;

R. v Manchester Legal Aid Committee: Ex parte Brand [1952] 2 Q.B. 413 referred.

APPEAL under Goldsmiths Ordinance

Eso for the appellant;

Bello, Crown Counsel, for the respondent.

Hurley Ag. C.J. (delivering the judgment of the Court):

The appellant is a goldsmith. He held a licence under the Goldsmiths Ordinance. In June this year the Resident, acting under section 6 (1) of the Ordinance, revoked the licence for the remainder of the year. The appellant now appeals against that revocation under section 6 (2), which gives a right of appeal to this Court to a person aggrieved by the revocation of a goldsmith's licence.

Mr Eso for the appellant has argued that the Resident's power under section 6 (1) is a quasi-judicial power which must be exercised according to the rules of natural justice, including the rule that each party must be given an opportunity of stating his own case. He says that the appellant was not given an opportunity of stating his case against the revocation of the licence, and asks that the appeal be allowed on the ground that the revocation was not effected in accordance with the rules of natural justice. To show that the Resident was exercising a quasi-judicial power, he cites paragraph 604 of volume 26 of the 2nd Edition of Halsbury, at page 284. We have

Okakpu v Resident, Plateau

Hurley, Ag. C.J.

examined the cases cited in the notes to that paragraph. In most of them, the question was whether the authority or body whose proceedings were under consideration was or was not a court in the full sense of the word, for example, whether it was a court so that an appeal lay from it under the Summary Jurisdiction Acts, or whether it was a court so as to make the occasion of the proceedings before it a privileged occasion for the purposes of the law of libel. Those cases do not assist us. In some of the cases mentioned in the note, and in several later cases where quasi-judicial powers were in question, the question was whether the body or authority was exercising judicial or quasi-judicial powers, that is, whether it was under a duty to act judicially in a matter affecting the rights of subjects. If it was, the High Court in the King's Bench Division could interfere by means of certiorari or prohibition. If the powers exercised were not judicial, but purely ministerial or administrative, the King's Bench Division could not interfere, because certiorari and prohibition run only to a court or other body acting judicially. In the present case, however, an appeal lies to this Court, so we do not have to decide whether the Resident was acting administratively or judicially before we assume jurisdiction. In the exercise of our jurisdiction, however, we do have to decide whether the Resident was bound to act judicially and therefore in conformity with the rules of natural justice, or whether he was acting administratively. If the Resident's powers were administrative, this Court will still have jurisdiction to interfere, and will be bound to interfere if grounds are shown, because the appeal lies from the Resident's determination on any view of the nature of his power of revocation and independently of whether it is a judicial or an administrative power.

Under the Goldsmiths Ordinance a goldsmith may not carry on business without a licence. Application for a licence is to be made to the Resident in writing on the prescribed form, which requires the applicant to state, *inter alia*, whether he has been convicted of an offence against the Goldsmiths Ordinance. The Resident may grant the licence, or he may in his discretion refuse to grant it. He is not required to make any investigation before granting or withholding it. Every goldsmith must have a balance and accurate weights, and must keep books showing very full particulars concerning all his purchases of gold, all articles of gold made or sold by him, all jewellery received by him for repair or other purposes, and all receipts given by him. He is bound to issue a receipt whenever gold or articles of gold are deposited with him or bought or sold by him. Non-

compliance with any of the provisions of the Ordinance is an offence. The appellant was convicted on June 6th of receiving a gold chain for alteration without entering the name, address, and description of the owner in his book, and of receiving the chain for alteration without giving the owner a receipt. He was fined £2–10*s*–0*d* for each offence. The Acting Senior Superintendent of Police wrote to the Resident reporting the convictions and sentences and suggesting, in a second paragraph, that the Resident might wish to revoke the appellant's licence by virtue of the powers given by section 6 of the Goldsmiths Ordinance. Section 6 (1) is as follows—

> "A Resident may in his discretion refuse to grant a licence or to renew any licence which has expired and may revoke any licence which has been issued or renewed."

A Resident is not required to make any investigation before revoking a licence. In the present case, the Resident minuted on the Police Superintendent's letter "L.A.—Do you recommend action as in para. 2?" "L.A.", we suppose, stands for Local Authority. To this the following minute was made in reply—"Resident—I have seen this chap's premises and interviewed him re tax, etc., and from what I have learnt I recommend that his licence be revoked for the rest of this year." The Resident then minuted "Letter to him acc'ly pl." and on 17th June a letter was addressed to the appellant referring to his convictions and revoking his licence for the remainder of the year.

From the foregoing, it does not in our judgment appear that the appellant was given an opportunity of being heard on the question whether his licence should be revoked. But we are of opinion that the Resident's power to revoke a licence, like his power to withhold or grant one, is an administrative power in the exercise of which he is not required to act judicially. In *R. v. Metropolitan Police Commissioner: Ex parte Parker* [1953] 2 All E.R. 717 the Commissioner of Metropolitan Police revoked a taxi-driver's licence in the exercise of his powers under the London Cab Order, 1934, paragraph 30 (1), which provides—

> "A cab-driver's licence shall be liable to revocation or suspension by the Commissioner of Police if he is satisfied, by reason of any circumstances arising or coming to his knowledge after the licence was granted, that the licensee is not a fit person to hold such a licence."

Before revoking a licence under that paragraph, we observe, the Commissioner has to be satisfied that the licensee is not

Okakpu v Resident, Plateau

Hurley, Ag.C. J.

a fit person to hold a licence. The discretion given to the Resident to revoke a licence by section 6 (1) of the Goldsmiths Ordinance is unqualified. Further, the discretion of the Commissioner of Metropolitan Police to refuse a taxi-driver's licence, which he has under an order made by the Secretary of State dated 30th December, 1907, is a limited discretion, in that a licence may only be refused on one of the grounds set out in the order: *R. v Metropolitan Police Commissioner: Ex parte Holloway* [1911] 2 K.B. 1131; the Resident's discretion to refuse a goldsmith's licence is not limited in any way. A Resident's discretion in regard to refusing or revoking licences under the Goldsmiths Ordinance is thus considerably wider than the Commissioner of Metropolitan Police's discretion in regard to refusing or revoking taxi-drivers' licences. In *Parker's* case, which was an application for an order of certiorari, the commissioner decided to revoke the applicant's cab licence upon information that he had been allowing his taxi-cab to be used by prostitutes for carrying on their trade. The applicant's licence had been suspended on previous occasions and he had been convicted of various offences in the use of his taxi. Having decided to revoke the licence, the commissioner agreed that the applicant should be brought before a departmental committee set up by him, the commissioner, to assist him in such matters, and that the applicant should there be confronted with two police constables. He gave instructions that the applicant's licence should be revoked unless anything transpired before the committee which in their opinion might lead him to reconsider his decision to revoke it. The applicant was confronted with the police constables before the committee as the commissioner had directed. The constables read statements which the applicant denied, and the applicant asked to be allowed to call a witness. This he was not allowed to do, and the committee gave as its opinion that nothing had traspired before them which might lead the commissioner to reconsider his decision to revoke the licence. Upon the hearing of the application for the order of certiorari, it was contended for the applicant that the inquiry before the committee was in the nature of a judicial proceeding, and that the refusal to allow the applicant to call a witness had been a denial of natural justice. The Divisional Court held that in exercising his power to revoke a licence under paragraph 30 (1) the commissioner was exercising an administrative, and not a judicial or quasi-judicial, function; as the decision to revoke had already been reached, and the commissioner was under no obligation to refer the matter to the committee,

whose function therefore was merely to confront the applicant with the police officers, the committee was not exercising a judicial or quasi-judicial function; and certiorari would not lie.

Parker and Donovan JJ. however observed that if the commissioner had set up a committee of inquiry, charging it to hear evidence and report its finding to him so that he might decide whether to revoke the licence or not, such a committee might, or in Donovan J.'s view would, be acting judicially and would have to observe the rules of natural justice. The Resident, in our view on the material before us, did not do that in this case. He asked the Local Authority for his opinion before he came to a decision, and the Local Authority went to the appellant's premises and interviewed him before he gave his opinion, and that was all. There was no confrontation, there was no evidence, and there was no proposal and objection (see *R. v Manchester Legal Aid Committee: Ex parte Brand* [1952] 2 Q.B. at page 429). The steps taken by the Resident and the Local Authority were even further removed, in our view, from anything in the nature of a judicial proceeding than were the steps taken by the commissioner and his committee in *Parker's* case. For that reason, and because the Resident's discretion both to refuse and to revoke a goldsmith's licence is so much wider than the discretion of the Commissioner of Metropolitan Police to refuse or revoke a cab-driver's licence, it is in our opinion abundantly clear in this case that the Resident was neither required to proceed judicially nor did so proceed, and that the exercise of his discretion to revoke the appellant's licence was an administrative act. Therefore the fact that the appeallant was not given an opportunity of being heard is not a ground for interfering with the revocation.

We have still to consider whether any other ground has been shown. It is a ground of appeal that the revocation of the licence was excessive considering the offences which the appeallant had committed. We asked Mr Eso on what other grounds the exercise of his discretion by the Resident in an administrative way as it was exercised here might be challenged in an appeal to this Court under section 6 (1), and Mr Eso said that the discretion must be exercised reasonably. We see nothing excessive or unreasonable in the revocation of the appellant's licence from mid-June until the end of the year. It is plain from the prescribed form of application for a licence and from the nature of the duties which the Ordinance imposes on goldsmiths that a conviction

Okakpu v Resident, Plateau

Hurley, Ag. C.J.

for an offence under the Ordinance is a material and most cogent reason for refusing or revoking a licence, and we have been shown no reason for saying that the revocation of the appellant's licence to the end of the year is excessive. We see no ground for interfering with the Resident's revocation of the appellant's goldsmith's licence, and this appeal will be dismissed.

Appeal dismissed.

GABRIEL OMAKU AND ANOTHER *v* IGBIRRA NATIVE AUTHORITY

[C.A. (Hurley Ag. C.J. and McCarthy Ag. J) October 18, 1957]

[Jos—Criminal Appeal No. JD/33CA/1957]

Appeal—Native court to High Court—Criminal appeal—English rules of evidence and procedure not observed in trial court—Principles upon which High Court acts—Northern Region High Court Law, 1955, *s.* 62—*Native Courts Law*, 1956, *ss.* 20, 21, 22; *s.* 67.

———— ———— *Unwritten native law and custom administered in trial court—Procedure in trial court—Assessors not required to aid High Court—Presumption that procedure was in accordance with native law and custom.*

The appellants were charged jointly with stealing before a Grade B native court administering unwritten native law and custom, which was unlikely to have been formulated in express rules of evidence and procedure, and were both convicted. The trial court failed to observe English rules of evidence and procedure in certain particulars. There was no suggestion that the misconduct alleged against the appellants did not constitute an offence under the native law and custom administered by the trial court.

Held:

(1) The questions for the Appeal Court were—

(*a*) What was the native law and custom regulating procedure and evidence in the trial court?

(*b*) Was there any native law and custom regulating the jurisdiction of the trial court in those particulars in which it had not observed English rules of evidence and procedure?

(*c*) If so, was the offence proved according to the requirements of native law, that is, according to the native law rules of evidence and procedure?

(*d*) Was there any likelihood of a miscarriage of justice?

(2) The advice of assessors regarding the native law and custom of the trial court, so far as it regulated evidence and procedure, could not have been of any assistance. Accordingly, the appeal court would not

Omaku and another v Igbirra N.A.

Hurley, Ag. C.J.

take the advice of assessors, and would proceed upon the following presumptions—

(*a*) that there was native law and custom to regulate the procedure of the trial court in all particulars material in the appeal, and

(*b*) that the trial court had observed the native law and custom;

so that it lay upon the appellant either—

(*i*) to prove that the native law and custom had not been followed in the trial court, or

(*ii*) to show that what the trial court had done was contrary to natural justice, morality, equity or good conscience.

Cases referred to:

Rabo Maroki v Kano Native Authority 1956 N.R.N.L.R. 5 followed;

Commissioner of Police v Kemavor 7 W.A.C.A. 198 distinguished.

CRIMINAL APPEAL

Adeyeye Fajemisin for the appellants;

Nunan, Crown Counsel, for the respondent.

Hurley, Ag. C.J., (delivering the judgment of the Court, after dealing with the appeal on a second count, continued):

On the first count, the appellants were charged jointly with stealing and were tried together. Both were convicted and so they were accomplices. The first appellant was convicted largely on the evidence of the second appellant. The procedure followed in the trial court differed in certain ways from the procedure which would have regulated their trial in the High Court or a magistrate's court. For one thing, the second appellant was called as one of the prosecution witnesses, and later gave evidence again in his defence. In the High Court, or a magistrate's court, he could only have given evidence once, and he would not have given evidence at all if he had wished not to give evidence. If he had given evidence for the prosecution, he would have been acquitted, or convicted and sentenced, first. He could not have been compelled to be a witness while he was still on trial. Again, since the second appellant was an accomplice, if the trial had been in the High Court or a magistrate's court, the court, in considering the evidence which he gave against the first appellant, would have looked to see if there was other evidence to corroborate it, and if it saw none, the court would

have warned itself that it is dangerous to convict on the evidence of an accomplice without corroboration. The trial court here does not appear to have looked for corroborative evidence as such, and they did not warn themselves as the High Court or a magistrate's court would have done in the absence of corroboration, assuming they had not seen it.

By sections 20, 21 and 22 of the Native Courts Law, 1957, the law to be applied and the practice and procedure to be followed in the trial court were the native law and custom prevailing in the area of the jurisdiction of the court and not repugnant to natural justice, equity, or good conscience, or the provisions of any written law; and by section 62 of the High Court Law, 1957, where the jurisdiction conferred on a native court "is, as regards law, practice, or procedure, regulated in any particular by native law and custom, no objection to any proceedings in such court shall be taken or allowed on the hearing of an appeal from a decision of such court on the ground only that, in any such particular, there has been a failure to observe any principle of English law or any English rule of evidence or procedure, if such proceeding or decision is not in fact contrary to natural justice, morality, equity or good conscience nor incompatible with the provisions of any written law,..." The trial court in this case failed to observe the English rules of evidence and procedure in the following particulars: by allowing the second appellant to be treated as a compellable witness while he was still an accused person on his trial; by hearing him testify twice during the trial against the first appellant; by failing to look for corroboration of the evidence the second appellant gave against the first appellant; and, assuming that they saw none, by failing to warn themselves of the danger of convicting without such corroboration. We have first to look to see, therefore, what was the native law and custom regulating procedure and evidence in the trial court, and whether there was any native law and custom regulating its jurisdiction in those particulars in which it did not observe English rules of evidence and procedure; and then, following *Rabo Maroki v Kano Native Authority* 1 N.R.N.L.R 5 we must consider whether the offence charged against the appellants was proved according to the requirements of the native law, that is, in accordance with the native law rules of procedure and evidence. The first question in *Rabo Maroki's* case, we observe in passing, does not arise here, for there can be no suggestion that stealing does not constitute an offence against the native law and custom of the trial court.

Omaku and another v. Igbira N. A.

Hurley, Ag. C.J.

In this case, we have not had the advice of assessors on the native law and custom of the trial court as regards procedure and evidence. We do not believe that such advice would have been of any possible assistance. The native law and custom of the Okene Grade B court is not written law, and so far as it regulates evidence and procedure it is unlikely to have been formulated in express rules or clearly settled. The native law and custom could no doubt be seen in what the native courts in the area have done from time to time in cases of various kinds, but on a practical view we can for the present as a rule only find the native law for a particular case what the court did in the trial of that case. That is to say, in effect, that in such circumstance we must presume there is native law and custom to regulate the procedure of the native court of trial in all prticulars material in the appeal, and that the native court had observed the native law and custom. The legality of the proceedings of the trial court, and the manner and sufficiency of the proof adduced before it, can be challenged by an appellant only by proving positively that native law and custom have not in fact been followed, or by showing that there is something in the native law and custom contrary to natural justice, morality, equity, or good conscience. In the present case, nothing has been put before us to show that the trial court did not regulate its proceedings according to its native law and custom; and it is not a rule of natural justice that an accused person is not a compellable witness at his trial, or that a witness cannot testify twice in the same trial, or that there must be corroboration of the evidence of an accomplice or a warning that it is dangerous to convict on it, nor in our opinion would a failure to observe any of these rules, or a native law and custom which permitted their non-observance, be contrary to morality, equity, or good conscience. In *Commissioner of Police v Kemavor* 7 W.A.C.A. 198, where the appellant's co-accused had pleaded guilty and been called as a witness before sentence, the appeal court said that it was a fundamental principle that an accused person undergoing trial can only be called as a witness on his own application, and that disregard of the principle struck at the whole root of the administration of the criminal law. But the trial in that case had been in a magistrate's court, and the principle in question was a principle of English procedure to which we are not to have regard in this appeal. Nevertheless, if we think that there is anything in the proceedings of the trial court which would constitute sufficient ground for interfering with its decision, we may interfere under section 67 of the Native Courts Law, and ought to

interfere; and at this point we have to ask ourselves the third question formulated in *Rabo Maroki's* case, whether there is any likelihood that there was a miscarriage of justice.

(The Court then proceeded to deal with the evidence and findings in the trial court, and concluded):

We think that in this case there was sufficient evidence to support the trial court's findings. We do not think, looking at the case as a whole, that there is any likelihood that the findings involve a miscarriage of justice, in spite of the procedure, strange to our law, which was followed at the trial. On the contrary, we think that the findings were sensible and correct, and that the trial court was not led into any error by the procedure which it followed in arriving at them.

The appeals of the first and second appellants on the first count are dismissed; the first appellant's appeal on the second court is allowed.

Appeal on the first count dismissed/ appeal on the second count allowed.

ABUBAKAR MOHAMMED BIDA *v* ZARIA NATIVE ADMINISTRATION

[C.A. (Hurley Ag. C.J., Smith Ag. S.P.J.) November 1, 1957]
[Zaria—Criminal Appeal No. Z/1CS/57]

Statute—Construction—Appeal from court established under repealed statute—Jurisdiction to determine appeal pending at commencement of repealing statute—Native Courts Law, 1956, *s.* 86.

The appellant was convicted in a native court established under the Native Courts Ordinance, and on 29th April, 1957, appealed to the magistrate's court, which was the court to which the appeal lay at that date. On 1st May, 1957, the Native Courts Law, 1956, came into operation, repealing and replacing the Ordinance. Section 86 of the Law provided, in the circumstances of the case, that the appeal should be continued and concluded by the magistrate's court in like manner as if it were from a native court constituted or deemed to have been constituted under the Law. Appeals from native courts constituted under the Law lie to native courts of appeal, to the Moslem Court of Appeal, or to the High Court, but there is no provision for appeals to magistrates' courts. In the magistrate's opinion, the provisions of section 86 meant that the manner in which he should deal with the appeal was by refusing to hear it for want of jurisdiction, and he refused to hear it.

On a case stated for the opinion of the High Court—

Held: The Native Courts Law did not deprive a magistrate's court of its jurisdiction to hear appeals pending when the law came into force. Section 86 clearly showed an intention that appeals pending before a court immediately before the commencement of the Law should be continued and concluded in the same court. The magistrate had jurisdiction to hear the appeal on the basis of the general principle that when the law is altered during the pendency of an action the rights of the parties are decided according to the law as it existed when the action was begun unless the new law showed a clear intention to the contrary.

Case referred to:

Colonial Sugar Refining Co. v Irving (1905) A.C. 369 followed.

(*Editorial Note.*—By section 87 of the Native Courts Law, 1956, the Native Courts Ordinance, Cap. 142, is repealed; by section 3, provision is made for the establishment of native courts; by section 84, all native courts established under the Native Courts Ordinance are deemed to be native courts established under the Law; by section 2, "native court" means a court established under the Law or deemed to have been so established; by sections 61 and 62, provision is made for appeals from native courts to native courts of appeal, to the Moslem Court of Appeal, and to the High Court, but there is no provision for appeal from any native court to a magistrate's court).

CASE STATED

In April, 1957, the appellant was convicted on a charge of assault under section 351 of the Criminal Code by the Zaria Mixed Court, a native court established under the Native Court Ordinance, Cap. 142. By Gazette Notices Nos. 288 and 1178 of 1934 an appeal lay from the Zaria Mixed Court to the magistrate's court in cases other than Moslem cases. On 29th April, 1957, the appellant appealed to the Magistrate Grade I, Zaria. On 1st May, 1957, by Legal Notice No. 156 of 1957, the Native Courts Law, 1956, was brought into operation, save for certain sections not material to the present case which were already in operation. By the Native Courts (Jurisdiction and Powers) Notice, 1957, which also came into operation on 1st May, 1957, Gazette Notice No. 288 of 1934 was revoked, and an appeal lay from the Zaria Mixed Court to the Chief Alkali's Court in cases governed by Moslem law and to the High Court in all other cases. The appeal came before the magistrate in July, 1957, when he refused to hear it, being of opinion that the provisions of section 86 of the Native Courts Law (which are set out in the judgment) precluded him from hearing it. On the application of the appellant the magistrate stated a case, in which he set out the history of the appeal, the bringing into operation of the Native Courts Law by Legal Notice No. 156 of 1957, and the submissions made to him on behalf of the appellant, and continued—

"On the second submission I ruled that the words—'Shall be continued and concluded by such court in like manner as if the appeal were from a native court constituted or deemed to have been constituted under this Law'—govern the manner in which I am bound to deal with such cases as the present one; that the manner in which an appeal from the Zaria Mixed Court constituted under the Native Courts Law, No. 6 of 1956, must be dealt with by a magistrate's court, is

Mohammed Bida v. Zaria N.A.

Smith, Ag. S.P.J.

by refusing to hear the case as such a court has no jurisdiction; and that accordingly, in the present case, I could not hear the appeal.

"Counsel for the appellant has applied for this matter to be submitted to the High Court by way of case stated.

"The question upon which the opinion of the Court is desired is whether upon the above statement of facts I came to a correct determination and decision in point of law by refusing to hear the said appeal, and if not, the Court is respectfully requested to reserve or amend my determination, or remit the matter to me with the opinion of the Court thereon." .....

Razaq, for the appellant;

Lewis, *Acting Solicitor-General*, for the respondent.

Smith Ag. S.P.J. (delivering the judgment of the Court): Abubakar Mohammed Bida was tried and convicted by the Zaria Mixed Court on 3rd April, 1957, of an offence contrary to section 351 of the Criminal Code. He appealed by petition to the magistrate's court on 29th April. When the appeal came up for hearing, the magistrate decided, having regard to the provisions of section 86 of the Native Courts Law, that he had no jurisdiction to hear the appeal. He has stated a case for our consideration, and the question he asks is whether he was correct in refusing to hear the appeal.

Prior to 1st May, 1957, an appeal from the Zaria Mixed Court lay to the Chief Alkali's Court in Moslem cases and in other cases to the magistrate's court, by virtue of the Legal Notice made pursuant to section 45 of the Native Courts Ordinance. That ordinance was repealed and replaced by the Native Courts Law, 1956, with effect from 1st May, 1957. Section 86 of the new Law makes provision for the disposal of appeals pending immediately before the commencement of that Law. Section 86 reads as follows:—

> "Any appeal from a native court constituted under the Native Courts Ordinance which may immediately before the commencement of this Law be pending before any court shall be continued and concluded by such court in like manner as if the appeal were from a native court constituted or deemed to have been constituted under this Law and every judgment, order or sentence given issued or passed in such appeal may be enforced in such manner as if it were a judgment, order or sentence in an appeal from a native court constituted or deemed to have been constituted under this Law."

Under the Ordinance an appeal from a conviction under the Criminal Code by the Mixed Court, Zaria, lay to the magistrate's court and the appeal filed on 29th April in the magistrate's court was clearly pending before that court immediately before the commencement of the Native Courts Law within the meaning of section 86 thereof. The magistrate declined jurisdiction because that court was to be deemed to be constituted under the new Law and from no constituted under that Law did an appeal lie to a magistrate. The magistrate, therefore, felt himself obliged to "continue and conclude" the appeal by refusing to hear it.

Both Mr Razaq and Mr Lewis who appeared before us to argue the case stated submitted that the magistrate had jurisdiction to hear the appeal.

Mr Razaq based his submission on the general principle that when the law is altered during the pendency of an action the rights of the parties are decided according to the law as it existed when the action was begun unless the new law shows a clear intention to the contrary; that it was the intention of the legislature that an appeal pending immediately before the commencement of the Native Courts Law was to be determined in the court in which it was pending at that time; and that as section 86 did not clearly give effect to that intention it was open to this Court to add words to the section to make the intention clear. The courts are very reluctant to add words to a section in order to clarify the intention and we do not think that the necessity arises in the present instance.

Mr Lewis submitted that a right of appeal was a vested right and not a matter of procedure and cited *Colonial Sugar Refining Companny v Irving* [1905] A.C. 369 to support the view that section 86 of the Native Courts Law should be interpreted so as to respect the vested right. That case also supports the general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

The Native Courts Law is not retrospective. Although that Law does not give a magistrate's court jurisdiction to hear appeals which arise after the commencement of the Law, it does not expressly deprive that court of its jurisdiction to hear appeals that were pending at the time the Law came into force. Section 86 clearly shows an intention that appeals pending before a court immediately before the commencement of the Law should be continued and concluded in the same court.

Mohammed Bida v. Zaria N.A. — Smith, Ag. S.J.P.

The effect of the words "shall be concluded by such court in like manner as if the appeal were from a native court constituted or deemed to have been constituted under this Law" is to preserve for the purposes of the appeal the legal entity of the Mixed Court as constituted under the Native Courts Ordinance as if it were a native court constituted under the Native Courts Law.

We think that the magistrate has jurisdiction to hear this appeal on the basis of the general principle. Mr Lewis has pointed out that he also has jurisdiction under section 24 of the Magistrates' Courts (Northern Region) Law which has not yet been repealed. That section it is true is subject to the provisions of any other written law but as the Native Courts Law does not expressly deprive the magistrate of his appellate jurisdiction in the appeal which was pending before him, the jurisdiction given to him in section 24 of the Magistrates' Courts Law is still operative.

We do not think that the words

> ". . . . and every judgment, order or sentence given issued or passed in such appeal may be enforced in such manner as if it were a judgment, order or sentence in an appeal from a native court constituted or deemed to have been constituted under this Law."

in section 86 present any practical difficulty. At the conclusion of an appeal the appeal court directs the court below to carry out the order of the appeal court. It will then be the duty of the Zaria Mixed Court in the present instance to give effect to the order.

Our answer to the magistrate's question is that as he has jurisdiction to hear the appeal he was wrong in refusing to hear it and we now direct him to continue and conclude the appeal.

MAMMAN DURBAWA *v* GWANDU NATIVE AUTHORITY

[C.A. (Hurley Ag. C.J., Smith Ag. S.P.J.)
(Assessors: Malam Bello Kagara, Legal Adviser, Katsina N.A.; The Chief Alkali of Gwandu, Malam Abubakar Zaki)
November 1, 1957]

[Kano—Criminal Appeal No. K/45A/1957]

Moslem law—Homicide—Proof of intentional homicide—Confession of wounding causing death and evidence of two witnesses showing wounding was intentional—Interval between wouding and death—No first-hand evidence of death—Form of kasama oath.

The appellant fought with the deceased and stabbed him, and the deceased died after an interval. At his trial in the Court of the Emir of Gwandu for intentional homicide, the appellant confessed that he had stabbed the deceased and that the deceased had died in consequence. There were eye-witnesses of the fight whose evidence showed that the stabbing was intentional. Upon the appellant's confession and the evidence, the trial court ruled that there was circumstantial evidence (*lauth*) that the wound was the cause of death, and the agnates swore the *kasama* oaths to the effect, as set out in the trial record, that the stab wound which the appellant inflicted on the deceased was the cause of his death. There was no first-hand evidence of the deceased's death.

Held:

(1) That since the evidence showed that the wounding was intentional, it was not necessary that the *kasama* oath should include an assertion that it was intentional; the only purpose of the oath was to establish that the wound caused the death which did not follow immediately upon it.

(2) It was not necessary that the *kasama* oath should declare in terms that the deceased died, instead of merely implying it by declaring that the wound was the cause of his death.

Semble, a trial record need not set out the exact words of the *kasama* oath as administered.

Cases referred to:

M. Mamman Maizabo v Sokoto Native Authority, 1957 N.R.N.L.R. 133 applied.

Durbawa v Gwandu N.A. — Hurley, Ag. C.J.

[*Editorial Note:*—In *Kawule Dan Tukur Indabo v Kano Native Authority*, 1957 N.R.N.L.R. 33, which was cited in argument, it was held that the words "with intent" need not appear in the *kasama* oath where intent is not in issue.]

CRIMINAL APPEAL from the Moslem Court of Appeal.

Pickford for the appellant;

McLean, Crown Counsel, for the respondent.

Hurley, Acting C.J. (delivering the judgment of the Court, after summarizing the evidence and proceedings in the courts below): For the appellant, Mr. Pickford has submitted, first, that the appellant's defence that he stabbed Bagudu in self-defence or without intending to was never adequately considered or properly refuted in the trial court or the Moslem Court of Appeal, and that the evidence is consistent and supports these defences. We find it difficult to attach any weight to either of these defences. The appellant retracted the defence of self-defence at the trial as soon as it was made, and supported it by quite different allegations of fact when he brought it forward again in the Moslem Court of Appeal. He did not say the wounding was unintended or accidental before the end of the trial; and the contention that he did not intend to wound Bagudu is not only inconsistent with the contention that he wounded him in self-defence, it is also irreconcilable with his original confession of the wounding, unqualified until the very end of the trial by any suggestion that it was only accidental. As to the evidence, its effect appears to us to be as we have summarized it, and in our view and the Assessors' it is not consistent with either legitimate self-defence or with accident.

Next, it is submitted that there are discrepancies in the evidence of the four eyewitnesses which invalidate their testimony in Moslem law so that there was no proof of the killing and nothing to sustain the administration of the *kasama* oaths. It is suggested that there are two material discrepancies in this evidence. The first is said to lie between the evidence of the first witness and the next three about the appellant's threat or challenge to Bagudu when he told him that it was a matter of getting his money or giving his life. We see no real inconsistency here. The other is that the first witness said that the appellant followed Bagudu as if to stab him again while the other three said nothing about that. Our assessors advise us that this is not enough to invalidate the evidence in Moslem law, because it was not sufficiently material to the question whether the wounding was intended. They add, first, that in any event two at least

Durbawa v. Gwandu N.A.

Hurley, Ag. C.J.

of the eyewitnesses gave evidence which showed no discrepancies at all, and their evidence was sufficient to raise the presumption known as *lauth*; and secondly, that the appellant's confession had the same effect.

Next, Mr Pickford submits that the *kasama* oath in the form set out in the record is not sufficient because it does not state directly that Bagudu died. There is no first-hand evidence of Bagudu's death, and so, Mr Pickford says, the oath ought to have stated in terms that he died; it should have been in some such form as is set out in note (8) at page 8 of Anderson's Maliki Law of Homicide, which is "By God, than whom there is no other, he verily died from that blow" *et cetera*, and it is insufficient as noted in the record of this case, which says merely that the blood relatives swore that the wound was the cause of death, without asserting directly that the death occurred. The Assessors have explained to us how the *kasama* oaths are administered, and in what form. Every court has a person appointed to administer these oaths, a man learned in the Moslem religion.—He administers the oaths on all occasions when they are required to be taken, and he is in court during the trial of the case. When the oaths are to be taken, which is on a Friday, he gives water to those who are to swear with which to wash themselves, and so he is known as "Dan Wanka", or "Son of the Washing". Then they go to the mosque, and the oaths are taken before the public there present after the la'asar prayer. They are taken facing towards the East, one by one by each blood relative in turn until fifty oaths have been taken in all. Each time, the man who is swearing repeats the words of the oath after Dan Wanka. The form of the oath is well known in every court, and is to the following effect "I swear by the name of God, the Ruler who knows the things that are hidden and the things that are open, that I am certain that this man was the one who killed so-and-so my son" (or as the case may be) "and that the wound which he inflicted upon him with intent and without any fault on the part of him who was injured was what killed him". Minor variations may occur, but are not allowed to interfere with the course of justice. When the oaths have been administered, those concerned return to the court, and Dan Wanka reports to the court that the oaths have been taken according to law, and the scribe records the fact then and not before. He does not record the actual words of the oath; it is enough if he records, for example, "*Kasama* oath taken fifty times by so-and-so." The Assesors further advise us that to say that the blow was what killed the deceased is all that is required, taken with the

Durbawa v Gwandu N.A.

Hurley, Ag. C.J.

evidence or the surrounding circumstances which constitute *lauth.*

Our attention was also invited to the fact that the record of the words of the *kasama* oath in this case did not include an assertion that the wound was inflicted with intent. The Assessors advise us that that is not necessary here, because the evidence and the circumstances of the case were such that neither self-defence nor accident were in question; the wounding was clearly intentional, and the only purpose of the oath was to establish that the wounding caused the death which did not follow immediately upon it.

Finally, Mr Pickford asks us, if we uphold the decision as correct in Moslem law, to deal with the case as a case of manslaughter under provocation on the authority of M. *Mamman Maizabo v. Sokoto Native Authority*, 1957, N.R.N.L.R. 133. We have already reviewed the evidence as it was given at the trial, and the appellant's statements at the trial and in the Moslem Court of Appeal. All that neither satisfies us that the killing was manslaughter under the Criminal Code, nor leaves us in doubt whether it was murder or manslaughter. The appellant's statements have, in our judgment, no weight, because they were either retracted or were made so late as to appear merely to be afterthoughts, and because they are inconsistent with the evidence. The evidence is of a killing by means of a knife without provocation proportionate to the act or sufficient to ground a finding of manslaughter.

We have also considered whether for any reason there is likely to have been a miscarriage of justice. We see no reason to suppose that there was. In our view, neither self-defence nor accident are in question. There was no direct evidence of the death, but it was never in dispute. The appeal is dismissed.

Appeal dismissed.

MAIJU AGWAZIM *v* MERCY NAWDIAJU

[C.A. (Hurley Ag. C.J., Smith Ag. S.P.J.) November 2, 1957]

[Zaria—Civil Appeal No. Z/12A/1957]

Magistrates' Courts—Civil procedure—Answer or defence to plaint—Magistrates' Courts (Northern Region) Rules, 1955, *O.XXII, r.* 1. *Judgment in party's absence—Setting aside for new trial—Magistrates' Courts (Northern Region) Law*, 1955, *s.* 79.

When a defendant in a civil action in a magistrate's court is required to make his answer or defence to the plaint under Order XXII, rule 1, of the Magistrates' Courts (Northern Region) Rules, it is not sufficient for him to say that the claim is disputed. He must say why he disputes the claim, by making such answer or defence as may be appropriate. Without a specific answer or defence the magistrate will not know what is the issue to be tried.

Per curiam: Each party to a suit has the right to have the dispute determined on the merits, and where judgment has been given in the absence of a party and the failure to appear can be remedied by the payment of costs or the imposition of terms and conditions, the discretion given by section 79 of the Magistrates' Courts (Northern Region) Law is generally exercised in favour of the party applying for the suit to be relisted.

Case referred to:

Flint v Lovell [1935] 1 K.B. 360 applied.

CIVIL APPEAL

The facts appear sufficiently from the judgment.

Razaq, for the appellant;

Respondent in person.

Smith, Ag. S.P.J. (delivering the judgment of the Court): This is an appeal from the judgment of the Magistrate, Zaria awarding the respondent £100 damages for slander.

The suit came before the magistrate on 14th March and the note of the proceedings on that day reads:

"Parties present. Claim disputed. Adjd for trial on April 25/57."

Agwazim v Nwadiaju

Smith, Ag. S.P.J.

On the adjournment day the parties were again present and the appellant (then the defendant) was represented by counsel. The suit was adjourned to 6th June. On that day the case was heard in the absence of the appellant and her counsel and judgment delivered. Later the appellant applied by motion for the suit to be relisted and the application was refused.

In her grounds of appeal the appellant attacked the judgment and also alleged that the magistrate erred in the exercise of his discretion in refusing to relist the suit. We pointed out to Mr Razaq, Counsel for the appellant, that this was a composite appeal, an appeal against both the judgment and the dismissal of the motion; and asked him whether he was appealing against the judgment or the dismissal of the motion as it was not open to him to argue both matters in one appeal. Mr Razaq elected to proceed with the appeal against the judgment and withdrew his third ground of appeal which referred to the dismissal of the motion.

The respondent filed her suit in the magistrate's court on 18th February, 1957. The evidence in support of the claim was that on 26th January, 1957, the respondent was informed by one Maria Mathias that the appellant had said to Maria's husband that the respondent had killed Mathias' child; and when confronted with this statement by the respondent the appellant admitted, in the presence of Maria and one Veronica, that she said so. The slanderous words were in the words of Maria "She said Mercy killed my child with poison in her food." The child died "about two years ago"; that is two years before 6th June, 1957, the date on which Maria gave evidence. The slanderous statement was uttered to Mathias three days later. That was the evidence on which the magistrate based his judgment.

The first ground of appeal argued by Mr Razaq was that the judgment was unreasonable and could not be supported having regard to the evidence. The evidence before the magistrate, uncontradicted as it was in the absence of both the appellant and her counsel, proved the plaint as laid and we therefore find that there is no merit in this ground of appeal.

We would observe that the magistrate was complying with Order XXIII, rule 4 (1), of the Magistrates' Courts (Northern Region) Rules, 1955, when he heard the suit in the absence of the defendant. He is given a discretion to relist a suit in section 79 of the Magistrates' Courts (Northern Region) Law. Each party to a suit has the right to have the dispute determined on the merits and whenever the failure of a party to appear can

be remedied by the payment of costs or the imposition of terms and conditions the discretion is generally exercised in favour of the party applying for the suit to be relisted.

Mr Razaq's next ground of appeal was that the action was barred by the limitation of time. The slander was said to have been made two years prior to 6th June, 1957, the day of the hearing. The slander came to the knowledge of the respondent on 26th January, 1957, and she filed her plaint on 18th February. The time limit within which to commence a suit for slander actionable *per se* is two years and time begins to run from the uttering of the slander. In the present instance time began to run as from early June, 1955, and the suit was filed in time.

Where a defendant relies on limitation of time, that defence must be specifically pleaded. If it is not pleaded in the court below it is not open to an appellant to raise it on appeal. We, however, entertained this ground of appeal because counsel argued that it is not permissible to plead in a magistrate's court. With that submission we do not agree. Order XXII, rule 1, of the Magistrates' Courts (Northern Region) Rules provides:

> 1. (1) If on the day of the hearing both parties appear, the plaint shall be read to the defendant, and the magistrate shall require him to make his answer or defence thereto, and, on such defence or answer being made, the magistrate shall immediately record the same and shall, except where the court considers it necessary to order otherwise, proceed in summary way to hear and determine the cause, without further pleading or formal joinder of issue.
>
> (2) The court may, if it considers it necessary, order the parties to state more fully their respective cases and may thereupon frame issues before hearing and determining the cause; and in cases in which, owing to their difficult or complicated nature or the important points of law involved, pleadings are required. the court shall adjourn the matter and report to the Chief Justice with a view to the cause being transferred to the High Court.

It will be observed that rule 1 (1) the defendant to requeires make his answer or defence to the plaint. It is not a sufficient answer to say that the claim is disputed, as was done in the present case. The defendant must say why he disputes the claim. For example, in answer to a simple claim for debt the defendant may say the debt has been paid, or it is not

Agwazim v Nwadiaju

Smith, Ag. S.P.J.

yet due, or it is statute barred, or make such other answer or defence as may be appropriate to the case. It is not until a specific answer or defence is made that a magistrate will know what is the issue to be tried between the parties. If the issues need to be more fully stated the magistrate under rule 1 (2) may order the parties to frame the issues and if they are so complicated as to require formal pleadings he may refer the matter to the Chief Justice with a view to the case being transferred to the High Court.

The plea should be made on the day set out in the summons to appear to answer the claim. Application may be made to amend the answer or defence at a later stage and the magistrate when considering the application would bear in mind the powers given to him by section 31 (2) of the Magistrates' Courts (Northern Region) Law.

At no stage in the hearing before the magistrate did the appellant or her counsel plead that the suit was barred by limitation of time. The second ground of appeal therefore fails not only on the facts but also on the law.

The last ground of appeal was that the damages awarded were excessive. The principle to be applied in considering this question is, in the words of Greer L.J. in *Flint v Lovell* [1935] 1 K.B. 360: "In order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled." Applying this criterion to the present appeal and considering the circumstances of the case we do not think that the damages awarded by the magistrate were so extremely high that this Court should interfere.

The appeal is dismissed with costs to the respondent assessed at £1. 1s 0d

Appeal dismissed

JOHN HOLT AND COMPANY (LIVERPOOL) LIMITED *v* ALHAJI JAFA'ARU

[High Court (Smith J.) September 13, 1957]
[Kano—Civil Action—No. K/65/1956]

Contract—Principal and agent—Agent and sub-agent—Relationship between sub-agent and principal—Sub-agent communicating with principal—Liability of sub-agent to principal.

The defendant was recommended to the plaintiffs as a cotton buyer by one of their factors. There was no clearly defined contract either with the factor or the defendant. The plaintiffs made cash advances for the purchase of cotton, but to begin with these sums were paid to the factor and not to the defendant, and the ledger account opened in the books of the plaintiff company was in the name of the factor. The factor instructed the defendant to buy cotton and it was evacuated in lorries owned by the factor. The factor made cash advances to the defendant for the purchase of cotton although at a later stage in December, 1956, the plaintiffs started to pay advances direct to the defendant.

In January the defendant was visited by a representative of the plaintiffs together with the factor. The position as regards stock and finance was settled and the defendant signed a document setting out the position, in the presence of the factor. Thereafter all cash advances were paid to the defendant direct.

The plaintiffs now claimed for amounts outstanding upon an account stated, while the defendant alleged that he was a sub-agent of the factor and not an agent of the plaintiffs. The defendant however counter-claimed for commission and expenses.

Held:

(1) That the relationship between the plaintiffs and the factor, the factor and the defendant was that of principal and agent, agent and sub-agent.

(2) That there was no privity of contract between principal and sub-agent and therefore the plaintiffs' claim failed.

(3) The defendant's counterclaim failed because he was not employed by the plaintiffs.

John Holt v Jafa'aru — Smith, J.

Cases referred to:

Lockwood v Abdy (1845) 66 R.R. 621 applied;

Cull v Blackhouse (1793) 123 E.R. 990 followed.

CIVIL ACTION:

Hughes for the plaintiffs.

The defendant appeared in person.

Smith, J.: In the writ of summons the plaintiffs claimed from the defendant the sum of £217-16*s*-1*d* being the balance due on an account stated.

The plaintiffs alleged that the defendant was a factor employed by them to purchase cotton in the 1955-56 season and that the balance claimed was due and owing by him at the end of that season. The defendant alleged that he was employed by Baba Dan Kantoma as a sub-agent and was therefore liable to account to him and not to the plaintiffs.

Baba Dan Kantoma was a factor employed by the plaintiffs. He bought groundnuts on their behalf. He made a contract with the defendant to purchase groundnuts on his behalf at Gwashi and the defendant went there for that purpose. While the defendant was in this area he was employed to purchase cotton. The primary questions in this action are: by whom was the defendant employed and to whom was he responsible?

The difficulty in this case is that the plaintiffs did not make a clearly defined contract either with Baba Dan Kantoma or with the defendant. They dealt arbitrarily with both. And the evidence has therefore to be examined in order to decide what was the precise legal relationship of these parties.

What happened was that Baba Dan Kantoma was asked to recommend cotton buyers for two stations. One of these was Gwashi. Baba Dan Kantoma recommended the defendant for Gwashi and Mr Cater of the plaintiff company approved. At that stage it might appear that the plaintiffs intended to employ the defendant as their cotton factor at Gwashi on the recommendation of Baba Dan Kantoma. But the cash advances to purchase cotton were made by the plaintiffs to Baba Dan Kantoma not to the defendant. The plaintiffs opened a ledger account in the name of Baba Dan Kantoma which they later altered to the name of the defendant. The cotton bought by the defendant at Gwashi was evacuated in lorries owned by Baba Dan Kantoma. Baba Dan Kantoma according to the defendant, and I accept his statement, instructed him to buy cotton at Gwashi.

He was already there buying groundnuts for Baba Dan Kantoma. Baba Dan Kantoma made cash advances to him for the purpose of buying cotton. This continued into January. On 9th December the defendant received his first cash advance direct from the plaintiffs. From 4th to 19th January he received four more cash advances direct from the plaintiffs. Considering this evidence as a whole there is I think no doubt that the plaintiffs intended to make Baba Dan Kantoma responsible for the advances made to him. He was, in other words, their cotton factor. He instructed the defendant to buy cotton; he made cash advances to the defendant for that purpose. I find that Baba Dan Kantoma employed the defendant as a sub-agent with the approval of the plaintiffs' manager. The relationship of the parties up to 22nd January was that of principal and agent, agent and sub-agent. And as sub-agent the defendant was liable to account to Baba Dan Kantoma only.

On 22nd January Mr Carter and Baba Dan Kantoma visited the defendant. Mr Carter checked his accounts and made a summary of the financial and stock position on a produce daily report form and this was signed by the defendant in the presence of Baba Dan Kantoma. The effect of this was to settle the amount outstanding. At that time the total cash advances were £4,600. Of this sum the plaintiffs had handed £1,900 to Baba Dan Kantoma personally except for one amount which was handed to Ahamadu who was a cotton buyer at Adapka. The remainder was advanced direct to the defendant. Having regard to the relationship of the parties at this time the signature by the defendant of the produce report form made, as it was, in the presence of Baba Dan Kantoma confirmed the financial position as between the plaintiffs and their factor Baba Dan Kantoma. It did not make the defendant liable direct to the plaintiffs for all the advances Baba Dan Kantoma had received. The defendant was liable to account to Baba Dan Kantoma for such cash advances as he had received direct from him and the further advances he had received direct from the plaintiffs which in the circumstances must be considered to have been received on Baba Dan Kantoma's behalf.

There after all cash advances were received by the defendant direct from the plaintiffs. I do not think this altered the legal position of the parties. In *Lockwood v Abdy* (1845) 66 R.R. 621 a sub-agent took over the entire management of the principal's affairs and communicated direct with the principal. It was nevertheless held that the

John Holt v. Jafa'aru — Smith, J.

sub-agent was not liable to render an account of his agency to the principal. The defendant continued to be a sub-agent responsible to Baba Dan Kantoma only. The rights and duties arising out of contracts between principal and agent, and agent and sub-agent are only enforceable by and against the parties thereto. There is no privity of contract as such between a principal and a sub-agent though the relationship may be established if the agent be expressly authorised to constitute such relation and it is the intention of the agent and sub-agent that such relation should be constituted. The evidence does not disclose such an intention in the present case. The plaintiffs by their conduct clearly intended to make Baba Dan Kantoma responsible to them initially. Mr Carter did his checking in the presence and with the approval of Baba Dan Kantoma on 22nd January. And finally when it came to signing the ledger account upon which this claim is based, there is the evidence of the plaintiffs' clerk that the details of the account were not explained to the defendant who is illiterate; that he stood mute for about five minutes and then signed; and that Baba Dan Kantoma was present. The defendant said that he signed on the instructions of Baba Dan Kantoma. I believe this statement. I can see no reason for Baba Dan Kantoma's presence on this occasion unless he was still considered by the plaintiffs to be responsible to them. I am fortified in my opinion by the fact that commission on groundnuts due to Baba Dan Kantoma was included in this account; as also were other credit items to which the defendant had no claim. I find that the defendant was accountable as sub-agent to Baba Dan Kantoma and not to the plaintiffs.

Defendant counterclaimed for commission and expenses. This counterclaim fails because the defendant must sue the person who employed him (*Cull v. Blackhouse* (1794) 123 E.R. 990).

I enter judgment for defendant on the claim and for plaintiff on the counterclaim. There will be no order as to costs to either party.

Judgment for defendant on the claim. Judgment for plaintiffs on the counterclaim.

UNITED AFRICA COMPANY OF NIGERIA LIMITED *v* EDEMS AND AJAYI

[High Court (Smith J.) October, 18, 1957]

[Kano—Civil Action—No. K/66/1957]

Illiterates Protection Ordinance Cap. 88—*Section* 3—*Object of Ordinance—Bond under seal in name of the defendant—Defendant affixing his thumbprint thereto—Prima facie evidence of illiteracy—No. endorsement as required by section* 3 *of the Ordinance—Effect upon validity of bond.*

The object of the Illiterates Protection Ordinance is to protect an illiterate person from possible fraud. Strict compliance with it is obligatory as regards the writer of a document. If a document creates legal rights and the writer benefits thereunder, those benefits are only enforceable by the writer of the document if he complies strictly with the provisions of the Ordinance. The writer himself cannot adduce evidence in his own favour to remedy an omission to comply with the Ordinance.

CIVIL ACTION:

Grey for the plaintiff;
Shomade for both defendants.

Smith, J.: The plaintiffs claimed from Edems, the first defendant, as principal debtor, the sum of £301-7*s*-10*d*. being the balance owing on a groundnut account for the season 1956-57 and from Ajayi, the second defendant, the sum of £300 as bondor of the first defendant.

The first defendant admitted liability for £300-17*s*-10*d*. and this sum was accepted by the plaintiffs.

It remains to consider the question of the liability of the second defendant on the bond. It is a bond under seal in the name of the second defendant for £300 dated 12th October, 1956. The second defendant placed his thumbprint thereon and this has been witnessed by Garuba Ibrahim, the plaintiffs' clerk. The document has been cyclostyled with blank spaces for the name and address of the bondor, the amount, the date, and the name and address of the person bonded. These particulars have been filled in by the plaintiffs' clerk Garuba Ibrahim.

I find that the fact that the second defendant thumb-printed the bond is *prima facie* evidence that he is illiterate.

U.A.C. v. Edemis and Ajavi

Smith, J.

The attestation clause to the bond does not contain a statement to the effect that the bond was read over and explained to the second defendant before he thumbprinted it, nor is there an endorsement thereon of the name and address of the writer of the document, as required by section 3 of the Illiterates Protection Ordinance, Cap. 88.

The provisions of this section are mandatory and the section following provides for a penalty for failure to comply therewith. Section 3 applies to any person who writes a document in the name of an illiterate other than a barrister or solicitor in the course of his business who is exempted by section 5.

The document on the face of it does not comply with the section. The object of the Ordinance is to protect an illiterate person from possible fraud. Strict compliance therewith is obligatory as regards the writer of the document. If the document creates legal rights and the writer benefits thereunder those benefits are only enforceable by the writer of the document if he complies strictly with the provisions of the Ordinance. If a document which does not comply with the provisions of the Ordinance creates legal rights between the illiterate and a third party then evidence may be called to prove what happened at the time the document was prepared by the writer and the parties signed it. But the writer himself cannot adduce evidence in his own favour to remedy the omission.

In the present case the writer was Garuba Ibrahim. He was the plaintiffs' record clerk and as such the plaintiffs' agent for the purpose of the bond. The plaintiffs are a corporate body who act through their agents. The act of the clerk is the act of the plaintiffs. The bond was for their benefit. It does not comply with section 3 of the Ordinance. I therefore find that the bond is null and void as against the second defendant.

Judgment is entered for the plaintiffs against the first defendant for £300-17*s*-10*d* with costs assessed at £15-15*s*-0*d*.

Judgment is entered for the second defendant against the plaintiffs with costs assessed at £15-15*s*-0*d*.

Judgment for the plaintiffs against the first defendant.

Judgment for the second defendant against the plaintiffs.

DOMINIC OGOJA *v* ADAMAWA NATIVE AUTHORITY

[C.A. (Hurley Ag. C.J., Smith Ag. S.P.J., Reed J.; Assessors: Malam Bello Kagara, Legal Adviser, Katsina N.A.; the Chief Alkali of Gwandu, Malam Abubakar Zaki; the Chief Alkali of Misau, Malam Shehu; Alhaji Nasiru of Kano) November 21, 1957]

[Jos—Criminal Appeal No. JD/41CA/1957]

Appeal—Appeal from native court—Jurisdiction of High Court—Whether appeal to High Court or Moslem Court of Appeal—Whether case governed by Moslem law—Native Courts Law, 1956, *ss.* 20 (1) (*a*), 21, 62 (1) *and* (2).

By section 62 (1) of the Native Courts Law, 1956, an appeal from certain native courts lies to the Moslem Court of Appeal in cases governed by Moslem law and to the High Court in all other cases. By section 62 (2), a case is deemed to be governed by Moslem law if it is a case to the determination of which it is lawful and appropriate that the principles of Moslem law should be applied to the exclusion of the principles of any other system of law or of native law or custom other than the provisions or principles of certain written laws and natural justice, equity, and good conscience.

The appellant, a person subject to the jurisdiction of a native court and a non-Moslem, cohabited with a Moslem woman, and was convicted of the Moslem law offence of *zinna* or fornication by a native court from which an appeal lay as provided in section 62 (1). Moslem law prevailed in the area of he jurisdiction of the trial court. The appellant did not consent to be dealt with by the trial court, and was not given any option in the matter. The Moslem law is that a non-Moslem man who indulges in illicit sexual relations with a Moslem woman does not himself commit the Moslem law offence of *zinna*, and while a Moslem court applying Molem law will punish him for what he has done, it will only do so if he consents. If he does not consent to be dealt with by the Moslem court, it will send him to the court of his religion for trial and punishment.

On appeal to the High Court:

Held: the case was one to which it was lawful that the principles of Moslem law should be exclusively applied, but in the absence of consent on the part of the appellant to be

Ogoja v Adamawa N.A.

Hurley, Ag. C.J.

dealt with by the trial court applying Moslem law, it was not one to which it was appropriate that the principles of Moslem law should be exclusively applied. Accordingly, the case was not governed by Moslem law, and the appeal lay to the High Court.

Cases referred to:

Umaru Mafindi v Bauchi Native Authority, 1956 *N.R.N.L.R.* 41 applied.

John Duru v Gumel Native Authority, 1957 *N.R.N.L.R.* 151 applied.

CRIMINAL APPEAL from native court.

The facts appear from the headnote and the judgment.

Pickford for the appellant: By section 62 (1) of the Native Courts Law, the appeal in this case lies to the Moslem Court of Appeal if the case is governed by Moslem law; otherwise it lies to this Court. The case is not governed by Moslem law, and the appeal lies to this Court. By section 62 (2) of the same law, a case is governed by Moslem law if it is lawful and appropriate exclusively to apply the principles or Moslem law to the determination of the case. The words "lawful and appropriate" in the subsection have each a different meaning, and each must be given its full meaning. "Lawful" means lawful by virtue of some enactment, law or authority outside the Moslem law. The answer to the question whether it is lawful for Moslem law to be applied in a particular case is found in section 21 of the law. "Appropriate" means appropriate to the individual case; it has a like meaning with "proper" in the expressions "proper court" and "proper law" in private international law. A court which tries a case in a foreign country is called the proper court if it has jurisdiction in the case under the laws of that country; it is called a court of competent jurisdiction if it has jurisdiction according to the principles maintained by English courts: *Dicey*, Conflict of Laws, 6th Edition, page 345. The proper court is the court authorised to adjudicate by its own law; the court of competent jurisdiction is the court regarded as competent to adjudicate by an external system of law, that is, English law. There is a like difference between "appropriate" and "lawful" in section 62 (2). So, too, the proper law of a contract is the law which governs a contract by virtue of the contract itself: *Dicey*, page 579. "Appropriate" in section 62 (1) means appropriate by Moslem law, and the answer to the question whether it is appropriate for Moslem law to be applied in a case is to be found in Moslem law. This Court must consider whether

Moslem law may be applied to the case lawfully under the Native Courts Law, and whether it can be applied appropriately under Moslem law. Section 21 (1) says that Moslem law is to be applied in a criminal case; but it can only be applied as far as it goes: if the facts of the case do not constitute an offence under Moslem law, Moslem law is not appropriate to the case. Since appellant is a Christian, there was no offence in Moslem law; *Ruxton*, page 329, paragraph 1936, and page 331, paragraph 1948, refers only to Moslems in relation to the offence.

H. H. Marshal, Q.C., Attorney-General, for the respondent: First, how is the High Court to determine whether it is lawful and appropriate for a case to be governed by Moslem law? Section 21 (1) was drafted after the decision in *Reg. v Ilorin Native Court Ex parte Jimo Aremu & ors* 20 N.L.R. 144 decided under section 10 (1) (*a*) of the Native Courts Ordinance, Cap. 142, where it was held that if there are many tribes in an area, each with its own native law and custom, the native court will administer in the trial of an offence that native law and custom which is predominant in the area. The words "to the exclusion of any other native law or custom" in section 21 (1) of the Native Courts Law, 1956, are intended to make statutory the interpretation of section 10 (1) (*a*) of Cap. 142 as expounded in *Reg. v Ilorin Native Court*. The prevailing or predominant native law and custom excludes all other native law and custom in criminal matters. What is the prevailing native law and custom in this case is a question of fact to be proved by evidence: Evidence Ordinance, Cap. 63, section 58 and *Adedibu v Adewoyin* 13 W.A.C.A. 191; unless the fact has by frequent proof in the courts become so notorious that the courts take judicial notice of it: *Lawani Buraimo v Taiwo Gbamgboye* 15 N.L.R. 139 at page 140. I rely on our affidavits, and submit that Moslem law is the prevailing native law and custom and its exclusive application to the determination of this case is lawful. The appellant, though not a Moslem or a native of Adamawa, was subject to the jurisdiction of the trial court: Native Courts Law, section 15 (1) (*a*) and (*b*). I refer also to *Effiong Ekpo v Kano Native Authority* 1957 N.R.N.L.R. 129; the Order-in-Council cited at page 130 of the report had in fact been replaced by section 15 at the date of the judgment: Northern Region Legal Notices Nos. 252 and 253 of 1956. (The learned Attorney-General also referred to *Rabo Maroki v Kano Native Authority* 1956 N.R.N.L.R. 5, at page 7, citing *Katsina Native Authority v Abdullahi Kogo* 14 N.L.R. at page 51, and to

Ogoja v Adamawa N.A.

Hurley, Ag. C.J.

Rufai v Igbirra Native Authority 1957 N.R.N.L.R. 178, at page 181).

To say that it is lawful to apply Moslem law to the determination of a case, is the same as to say that the trial court has the power or duty of applying Moslem law; but I do not agree that the power or duty can be conferred or imposed only by statute or other external authority; it can also be conferred or imposed by the local equivalent of the common law, that is, custom and tradition, to which our affidavits speak. To say that it is appropriate to apply Moslem law has reference to the provisions of section 21 (2) of the law, which prescribes a choice of native law and custom in different kinds of civil cases; under the subsection, the application of one or another native law and custom being lawful, the question will arise, which is appropriate? But it does not arise under section 21 (1); whatever is lawful under the latter subsection is also appropriate, and no distinction can be made.

For these reasons I submit that this appeal lies to the Moslem Court of Appeal. I agree that *zinna* cannot be committed by a Christian, so far as appears from *Ruxton*.

[The Court took the opinions of the Assessors on the question of Moslem law.]

Attorney-General: Whether or not the case was governed by Moslem law, I submit this Court, if it refers the appellant to the Moslem Court of Appeal, may indicate what it thinks that Court should do with the appeal. Natural justice was not observed in the trial.

[*Court:* We agree that there was a failure to observe the rules of natural justice.]

Pickford in reply: The opinion of the assessors being that the man is not tried for *zinna* and is not to be punished by the Moslem Court unless he consents, I submit that the Moslem Court was not the appropriate court.

Section 21 (2) says only what is lawful; it does not deal with what is appropriate, and leaves no room for it. Anything done in accordance with section 21 is done lawfully.

Hurley, Ag. C.J. (delivering the judgment of the Court):

This is an appeal from a decision of the Court of the Lamido of Adamawa, convicting and sentencing the appellant for the Moslem law offence of *zinna* or fornication. There is a preliminary question of the jurisdiction of this Court to hear the appeal. The Lamido's Court is a Grade A native court, and its decision was given on 26th June, 1957. By

section 62 (1) of the Native Courts Law, 1956, which came into operation on 1st May, 1957, a party aggrieved by the decision of a Grade A court may appeal to the Moslem Court of Appeal in a case governed by Moslem law and to this Court in any other case. If this case is governed by Moslem law the appeal lies to the Moslem Court of Appeal and not to this Court. By section 62 (2) of the Native Courts Law, a case is deemed to be governed by Moslem law if it is a case to the determination of which it is lawful and appropriate that the principles of Moslem law should be applied to the exclusion of the principles of any other system of law or of native law or custom, other than the provisions or principles of the Native Courts Law itself, the Moslem Court of Appeal Law, 1956, any other law affecting native courts, any subsidiary legislation made under any of the laws just mentioned, and natural justice, equity and good conscience.

It is not in dispute that the appellant, a storekeeper employed by the Public Works Department at Mubi in Adamawa Province, is a person subject to the jurisdiction of the trial court, and that he is not a Moslem. The woman concerned, on the other hand, was a Moslem. The decision of which the appellant complains was a finding that he had committed the offence of *zinna*, and a sentence of a fine of £25 with the alternative of six month's imprisonment. By section 20 (1) (*a*) of the Native Courts Law, a native court may administer the native law and custom prevailing in the area of its jurisdiction, and by section 21 (1), in criminal cases the native law and custom prevailing in the area of the juridiction is to be applied to the exclusion of any other native law or custom. We are satisfied of the fact that Moslem law prevails in the area of the jurisdiction of the trial court. That being so, and the appellant being a person subject to the jurisdiction of the trial court, it follows that the case was one to the determination of which it was lawful that the principles of Moslem law should be exclusively applied.

On behalf of the appellant, it is submitted that the case is not one governed by Moslem law, because it is not one to the determination of which it is appropriate, as well as lawful that Moslem law should be applied. Moslem law, it is said, is not appropriate to the determination of the case because by its own principles it does not extend to the case; it does not treat fornication by a non-Moslem as an offence, and therefore it has no rule or principle for dealing with it.

We have consulted our assessors in Court and in chambers in order to learn what Moslem law says about a

Ogoja
v
Adamawa N.A.

Hurley, Ag. C.J.

case like the appellant's, where the male offender is not a Moslem and the woman is. The answer is this: the woman's offence will be the Moslem law offence of *zinna*, the man's will not. The Moslem court applying Moslem law will punish the man for what he has done, but not as for *zinna*, and only if he consents. If he does not consent to be dealt with by the Moslem court, it will send him to the court of his religion for trial and punishment. So cases like the appellant's are not outside the ambit of Moslem law; they are not cases about which Moslem law has nothing to say. On the other hand, they are cases which Moslem law will determine only conditionally upon the accused person's consenting thereto; if in a particular case the accused does not give that consent, the case will be sent elsewhere to be determined according to the principles of the accused's own law. The word "determination" in section 62 (2) of the law means complete determination, the hearing and conclusion of the case. A case of fornication against a non-Moslem where the accused does not consent to be dealt with under the Moslem law is a case to the determination of which Moslem law is not applied to the exclusion of any other law; it is by the rules of Moslem law itself that Moslem law is not so applied; the case, then, is not a case to the determination of which it is appropriate that Moslem law should be so applied; and the case is not a case governed by Moslem law.

We have now to look to see whether the circumstances of the present case make it a case of the last-mentioned kind, and for that purpose we must inquire into the course of the proceedings in the trial court. We do not at this stage do that in order to see whether or not the case was rightly decided by the trial court, for we cannot consider that question before we are satisfied that the appeal lies to this Court; if the appeal does not lie to this Court the question will be one for the Moslem Court of Appeal and not for this Court. We do it because the case is one of a kind to the determination of which Moslem law exclusively applies only upon condition, and we must see whether or not the condition has been satisfied in the particular case. In fact it has not; the appellant did not consent to be dealt with by the trial court, and was not given any option in the matter. Accordingly, his case was not one to the determination of which it was appropriate that Moslem law should have been exclusively applied; it was not governed by Moslem law, and the appeal lies to this Court.

Dealing now with the appeal, we observe that the appellant was brought before the trial court in connection with the death of a woman named Laraba Numan. The appellant admitted that he had been cohabiting with Laraba and that she had died as she lay beside him one night while he was asleep. There was evidence that she had died from natural causes, and the trial court said "for that reason he is found not guilty of homicide." The trial court then found the offence of fornication on the part of the appellant proved by his own admission, and sentenced him. He was before the trial court for homicide, not for fornication, and no complaint of fornication had been made against him. He was convicted and sentenced without having been accused, which was contrary to natural justice. There was no complainant, which was contrary to the rules of Moslem law: *Umaru Mafindi v Bauchi Native Authority* 1956 N.R.N.L.R. 41; *John Duru v Gumel Native Authority* 1957 N.R.N.L.R. 151. For these reasons the appeal is allowed.

Appeal allowed.

ABU OSIDOLA *v* COMMISSIONER OF POLICE

[C.A. (Hurley Ag. C.J., Smith Ag. S.P.J.) August 23, 1957]
[Kano—Appeal from Magistrate's Court—No. K/38A/1957]

Evidence—Accomplice—Bribery and extortion—"Victim".

The fact that a man has given a bribe affords evidence upon which a trial court may, and generally ought to, find that he is an accomplice in the offence of taking the bribe; but if there are other facts and circumstances which go to show that his position is that of a victim of the man who takes the bribe, then the court may find that he is a victim, and upon such a finding he will not be regarded as an accomplice upon whose evidence it is unsafe to convict without corroboration.

The facts and circumstances which would afford evidence capable of supporting a finding that the giver of the bribe is a victim are such facts and circumstances tending to show fraud or duress vitiating consent to parting with the bribe, though not to the whole of the transaction, as would go to prove a charge of extortion against the accused person.

Per curiam the giver of the bribe may safely be regarded as a victim if, on the facts, the case is one of extortion as well as one of bribery.

CRIMINAL APPEAL

Cases Considered:

Okeke v Commissioner of Police 12 W.A.C.A. 363;
Reg. v Usuman Pategi 1957 N.R.N.L.R. 47;
R. v George 4 N.L.R. 5;
Davies v Director of Public Prosecutions [1954] A.C. 378; 38 Cr. App. R. 11; [1954] 2 W.L.R. 343; [1954] 1 A.E.R. 507;
Yusufu Tudun Wada v Inspector-General of Police 1957 N.R.N.L.R. 1; *R. v Dare* 5 W.A.C.A. 122;
Chiedu v Inspector-General of Police 1956 N.R.N.L.R.69;
R. v Adelabu 1955-56 W.R.N.L.R. 111;
R. v Anyaleme 9 W.A.C.A. 23;
Al-Hassan v Commissioner of Police 10 W.A.C.A. 238;
Awuah v Commissioner of Police 13 W.A.C.A. 1.

Shyngle for the appellant;
McLean, Crown Counsel, for the respondent.

The facts appear from the judgment.

Hurley Ag. C.J. (delivering the judgment of the Court):

The appellant, a constable in the Nigeria Police, was convicted of an offence under section 116 (1) of the Criminal

Code by corruptly receiving a sum of money from one Usman Gumel in order to refrain from prosecuting him for an offence. Usman's evidence was that the appellant came to his house one night and said he was investigating the theft of a cheque for £2,400 in connection with which some men had already been arrested, and that he had heard that Usman knew something about it. This Usman at first denied, though in fact, it appears, he did know something, for in cross examination he said "At first I denied knowing anything about the stolen cheque. Later I told him the truth." When Usman Gumel denied knowing about the stolen cheque, the appellant said they should go to the charge office, and to this Usman agreed. The appellant then told Usman to wait, and sat down and said "You know that whether you are guilty or not if I take you to the Charge Office you will be locked up till the investigation ends. Instead of being locked in the cell for nothing if you are not guilty, you should try to give £20." Usman asked why, and the appellant said "That means you want to be locked up?" Usman said that was not so, and the appellant said "Therefore you must give me £20, otherwise I will take you and lock you up. Thereupon Usman gave him £8; and on subsequent occasions the appellant came and collected further sums to a total of £17-10-0. On the last occasion he said "Look, I am very serious now. My Inspector has told me to come and arrest you now, and the money you have given me is not enough to cover you." Two days later Usman was arrested and detained in connection with the alleged theft of the cheque, and then, but only then, he made a complaint against the appellant to the Police.

The learned trial magistrate found that Usman was not an accomplice in the offence charged against the appellant, so that his evidence did not require corroboration. In so finding, he directed himself by referring to *Okeke v Commissioner of Police* 12 W.A.C.A. 363 and *Reg. v Usman Pategi* 1957 N.R.N.L.R. 47, both cases where persons who made payments to which the recipients were not lawfully entitled were regarded as the victims rather than the accomplices of the recipients. One of the grounds of appeal is that this was an error in law. The charge in *Okeke's* case was under section 404 of the Criminal Code and the charge in *Usman Pategi's* case was under section 406. We will refer to offences under these sections as offences of extortion, and will distinguish them from offences of bribery such as are created by sections 98, 112, 114-116 and 494. Section 99 creates an offence which is called extortion in the marginal note, but for the purposes of this judgment it may be classed with the offences

Osidola v C. of P.

Hurley, Ag. C.J.

of bribery which come before and after it in Chapter XII of the Code and which it resembles more closely than it does the offences allied to stealing created by sections 404 and 406. Since the case of *R. v George* 4 N.L.R. 5, in which it was decided that the givers of the bribes there charged must be regarded as the accomplices of the appellant who was alleged to have taken them, there have been a number of cases in which it has been decided that persons who might otherwise have been regarded, in the light of that decision, as accomplices of the accused person, were not his accomplices because they were his victims. Mr Shyngle, for the appellant, contends that every case where the payer was regarded as a victim has been a case of extortion, and not of bribery as here, and he submits that it is only in cases of extortion that the person who makes the payment to the accused can be his victim. In fact, as will appear, there are cases of bribery where the payers have been regarded as victims. Mr McLean, for the respondent, submits that the cases show that the test to be applied in deciding whether the payer is an accomplice or a victim is independent of the nature of the offence charged, and is this: Was it the payer who first approached the person who took the payment, or did the latter first approach the payer?; then in the first case the payer is an accomplice, and in the second case he is a victim.

Adapting the words of Lord Simonds in his opinion in *Davies v Director of Public Prosecutions* [1954] A.C. at p. 400 to the law defining principals and accessories in the Criminal Code, we may say that in Nigeria an accomplice is a person who is *particeps criminis* in respect of the actual crime charged, whether as a principal or as an accessory after the fact. The same judgment, at page 402 of the report, shows how the question whether or not a witness is an accomplice is to be decided; where the witness is not an accomplice by his own confession or plea or by having been convicted of the offence, it is a question of law whether there is any evidence to show he is an accomplice, and a question of fact whether such evidence does show he is an accomplice. Bearing these two propositions in mind, we will proceed to examine the Nigerian cases of bribery or extortion where the complicity of the complainant came in question, starting with the cases of extortion.

These are *Okeke's* case and *Usuman Pategi's* case. A third case, *Yusufu Tudun Wada v Inspector-General of Police* 1957 N.R.N.L.R. 1 did not raise any question as to the complicity of the witnesses, but was, like *Okeke's* case, followed in *Usuman Pategi's* case. In *Okeke's* case, the charge was under

section 404 of the Code. The accused was a station master in the Nigerian Railway, which in those days was a Government department. He demanded and received a payment to which he was not lawfully entitled, as a condition of making a railway wagon available for the carriage of goods by rail. Dealing with the ground of appeal that the accused had been convicted upon the uncorroborated testimony of accomplices, the West African Court of Appeal said "There is no substance whatever in this ground and it is quite untenable in argument that those who met the monetary demand of the appellant were accomplices to the demand. Nor, in meeting the demand, could they be regarded otherwise than as the victims of the appellant's rapacity". *Yusufu Tudun Wada's* case was under section 406 of the Code. The appellants demanded money from the complainant in order not to search his house on a warrant and take him to the police station, and to avoid that he paid them £10. It was argued on their behalf that they had not obtained the money without the consent of the owner, so that there was no intent to steal. It was held that what was required in the circumstances was a voluntary consent, free from any menace of such a nature as to unsettle the mind of the person upon whom it operated, and to take away from his acts that element of voluntary action which constitutes consent, and that the offence charged had been proved. In extortion cases, then, consent is vitiated by duress or fraud. *Usuman Pategi's* case was also laid under section 406. The accused took money from the complainants upon threats to arrest or prosecute them. The complainants met the demands because they feared the threats. It was found that they were victims not accomplices.

As was said in *Usuman Pategi's* case, it is well established that in cases of extortion the person who pays the money is a victim not an accomplice. Indeed, he cannot be an accomplice or *particeps criminis* in the offence charged. Section 404 makes it an offence for a person employed in the public service to demand or take property corruptly under colour of his employment, or to compel anybody to sell property at other than its fair market value, or to obtain lodging from anybody against his will and without payment or adequate payment, or to compel anybody to work without payment or without adequate payment. Section 406 makes it an offence to demand property with menaces with intent to steal, and as *Yusufu Tudun Wada's* case shows, that involves the intent to take it without the owner's consent. A man cannot be an accomplice to threatening or compelling himself or to subjecting himself to the deceit aimed at by a demand under colour

Osidola v C. of P.

Hurley, Ag. C.J.

of the employment of the person making the demand, or to an intention to get himself to part with his property without his consent. There can be no question of the complainant's being an accomplice in such cases—that is, in cases truly laid under section 404 or section 406. But the Courts have not always looked at it in that way. In *Okeke's* case and *Usuman Pategi's* case they found that the complainants were not accomplices because they were victims and in that they followed the bribery cases, stemming from *R. v Dare* 5 W.A. C.A. 122, which had earlier distinguished *R. v George* in circumstances which made the complainant appear a victim.

Besides *R. v George,* we have seen two other reported cases where the witnesses who paid bribes were regarded as accomplices; they are *Chiedu v Inspector-General of Police* 1956 N.R.N.L.R. 69 and *R. v Adelabu* 1955-56 W.R.N.L.R. 111. In each of the three cases there was evidence to show the witnesses were accomplices. In *George*, the approach to the accused was made by the complainants; in the other two, the initiative came from the accused in the form of a demand. No more need be said about these cases; we turn to the bribery cases, preceding the extortion cases already noticed, in which the view was taken that the witnesses were victims and not accomplices. These cases followed *Dare's* case, which itself was not a case of bribery or extortion, but is of interest as explaining the meaning of the expression "victim" in its original application. It was a case of slave dealing under section 369 (3) of the Criminal Code, which prohibits putting any person in servitude as a pledge for a debt. It was held that the boy pledged in contravention of the subsection could not be an accomplice in the crime of which he was a victim but which he did not commit, and which the law prohibited for his protection. A victim, then, in the meaning of the word as it was used in *Dare's* case, is a person who suffers the injury of an offence which is prohibited for his protection. But, while extortion injures the individual who is made to yield to it, bribery injures the common weal, not the giver of the bribe. It is made an offence for the protection of the community, not for the protection of persons who pay bribes. Nevertheless there are, as we have said, decided cases where on charges of bribery, not extortion, the Courts have taken the view that the persons who paid the bribe were victims and not accomplices. The first of them is not fully enough set out in the report to afford clear authority; but the second seems to put the law beyond doubt.

The first case is *R. v Anyaleme* 9 W.A.C.A. 23. The facts are not given, but the charges show that the accused was a police constable who was alleged to have asked and

received money from one Efitih in order not to prosecute him for forgery, contrary to section 98 (1) of the Criminal Code. The West African Court of Appeal, holding that the appellant had not been properly charged under the section and that a conviction under section 116 (1) could not be substituted, remarked obiter "in our view, the witness Efitih was a victim and not an accomplice". The other case, *Al-Hassan v Commissioner of Police* 10 W.A.C.A. 238, was laid under section 394 of the Criminal Code of the Gold Coast, as it then was. We see from the report of *Awuah v Commissioner of Police* 13 W.A.C.A. 1 that that section creates the offence of corruption by a public officer which consists in the officer's accepting a bribe in respect of the duties of his office. In *Al-Hassan's* case, the appellant was a Government officer whose duties included the engaging of labourers. The trial magistrate found that he had exacted £1 from each of four labourers before he would engage them. On appeal against his conviction of four counts of corruption contrary to section 394 it was pleaded that the labourers were accomplices. Dealing with that ground of appeal, the West African Court of Appeal said, in its judgment, "The evidence satisfies us that the witnesses referred to did not seek out the appellant and offer him a bribe, but that when they applied for employment, they were told that this would not be given to them unless they were prepared to pay to the appellant the sum of £1 which in all innocence they did. On these facts and on the authority of *R. v Dare* we are of opinion that they were victims and not accomplices and that this ground of appeal fails".

The law, then, is this: the fact that a man has given a bribe affords evidence upon which a trial court may, and generally ought to, find that he is an accomplice in the offence of taking the bribe; but if there are other facts and circumstances which go to show that he is in the position of a victim of the man who takes the bribe, then the court may find that he is a victim, and upon such a finding he will not be regarded as an accomplice upon whose evidence it is unsafe to conviet without corroboration. The question then arises: when is the giver of a bribe a victim? what facts and circumstances afford evidence capable in law of supporting a finding of fact that he is a victim? In approaching an answer to this question, we first observe that, as was pointed out in *Silas Ebute v Inspector-General of Police* (Jos Appeal No. JD/23CA/1957), the same facts may well establish an offence of bribery and an offence of extortion. That view receives support from *Yusufu Tudun Wada's* case. The evidence there did not show whether the warrant upon which the accused

Osidola v C. of P.

Hurley, Ag. C.J.

threatened to search the complainant's house was false or genuine. If it was genuine, the accused, in accepting money in order not to execute it, would have been guilty of taking a bribe. Because it was not shown that the warrant was not genuine, it was not shown that their conduct had not amounted to taking a bribe, but that did not prevent their being properly convicted of extortion. Next—omitting *Anyaleme's* case, where the facts do not sufficiently appear from the report—of the three cases where the persons who paid money to the accused were found to be the victims of the accused, two, *Okeke's* case and *Usuman Pategi's* case, were cases of extortion; and it seems to us that it was the element of extortion, of fraud or duress vitiating consent, which led the courts to regard the complainants as victims and not accomplices. The third case, *Al-Hassan*, was not prosecuted as a case of extortion but it too had in it elements of fraud or duress, of the same kind as are present in extortion cases, which led to the complainants being regarded as victims. The trial magistrate found that the money was "exacted", and upon the Appeal Court's view of the evidence it was paid in all innocence. Since the money was paid in all innocence, indeed, it would seem to have been paid in the belief that the accused was entitled to demand it, from which it would follow that the demand was made under colour of the accused's employment, and he could have been convicted upon a charge of the sort of extortion by a public officer that is prohibited by section 404 (1) of our Code; but the report does not enable it to be said with certainty that that was the case.

From these considerations we conclude that, in a prosecution for bribery facts and circumstances which would afford evidence capable of supporting a finding that the giver of the bribe is a victim are such facts and circumstances, tending to show fraud or duress vitiating consent to parting with the bribe though not to the whole of the transaction, as would go to prove a charge of extortion against the accused person. Having regard to the vagueness of the report of *Anyaleme's* case as to the facts, and the inconclusiveness of *Al-Hassan's*, we cannot say that the evidence must be capable of establishing extortion, rather than merely tend to prove it; but we think it a sound rule of prudence that it ought to amount to proof. In a prosecution for bribery, the giver of the bribe may safely be regarded as a victim and not an accomplice if, on the facts, the case is also one of extortion.

Applying that test to the present case, we ask ourselves: could the appellant have been convicted upon a charge of

extortion on the evidence disclosed on the record? We are clearly of opinion that he could have been convicted upon a charge of demanding money with menaces with intent to steal contrary to section 406. He took money in order to refrain from prosecuting Usman, as was charged and found against him. But there was evidence that he also demanded the money with threats to have Usman locked up if he did not pay, and that Usman, who was at first ready to go to the Police Station with him for the matter to be investigated, was not ready to be locked up, and paid in fear of being locked up, and without freely or fully consenting to the payment, but unwillingly. There was evidence to support the magistrate's finding that Usman, as a victim, was not an accomplice whose evidence required corroboration, and this ground of appeal fails.

The appellant was also convicted on a count charging him with compounding a felony contrary to section 127 of the Criminal Code. His other ground of appeal is that the conviction cannot be supported having regard to the evidence, and on this he must succeed as regards the charge of compounding a felony, for the sufficient reason that there is no evidence whatever of the commission of any felony.

Appeal allowed in part.

(*Editorial Note.* Since the above judgment was delivered the case of *Silas Ebute v Inspector-General of Police* referred to therein has been reported in 1957 N.R.N.L.R. 194.)

ABU OSIDOLA *v* COMMISSIONER OF POLICE

[Federal Supreme Court (Foster-Sutton F.C.J., De Lestang F.J., Abbot F.J.)—January 17, 1958]

Foster-Sutton, F.C.J. (delivering the judgment of the Court): After careful consideration we have reached the conclusion on the facts in this case that there was such a strong element of extortion as to make the complainant an unwilling victim. It follows, therefore, that in our view the Courts below were right in holding that he was not an accomplice. This appeal is accordingly dismissed.

Appeal dismissed.

NAJIB STEPHEN *v* OLLIVIO PEDROCCHI

[High Court (Hurley Ag. C.J.) November 2, 1957]
[Zaria—Civil Motion No. Z/7M/1957]

Practice and procedure—High Court—Transfer between judicial divisions—Northern Region High Court Law, 1955, *s.* 73—*Supreme Court* (*Civil Procedure*) *Rules*, *B. VII*, *rr.* 5, 6.

Section 73 of the Northern Region High Court Law, which empowers the Chief Justice to transfer any cause or matter before a judge to any other judge, is not confined to transfers between individual judges on grounds peculiar to them as individuals, but may be used where the purpose is to effect a transfer between judicial divisions on other grounds.

The order made was for a transfer from the judge in one division to the judge in the other division, without naming them.

MOTION

The respondent was the plaintiff in an action commenced in the High Court in the Kano Judicial Division whereby he claimed £11,740 being his share of the assets of a partnership between him and the defendant which had been dissolved, or alternatively all necessary accounts and inquiries, and also asked for an injunction to restrain the defendant from using the partnership property, books and papers, and for the appointment of a receiver and manager. On the return day, the defendant, relying on rules 5 and 6 of Order VII of the Supreme Court (Civil Procedure) Rules, made an oral application for a transfer of the case to the Jos Judicial Division. In reply, the plaintiff submitted that section 73 of the High Court Law left the High Court in Kano without jurisdiction to order a transfer. The submission was upheld, and the defendant applied for and obtained an adjournment for the purpose of applying to the Chief Justice for an order of transfer. The application was made in due course, in the following terms; "For an order for the above suit to be heard at Jos, pursuant to Order VII rule 5 of the Supreme Court Rules, and for such further order or orders as this Honourable Court shall deem necessary to make"

Razaq for the applicant;
Pickford for the respondent.

Hurley Ag. C.J. stated the facts and read the statutory provisions set out above, and continued:

Stephen v Pedrocchi

Hurley, Ag. C.J.

When the application came before me this morning, I pointed out that it appeared that it lay under section 73 and not under Order VII. The "court" in rule 5 of Order VII is the court of the judicial division where the action lies and the "judge" in rule 6 of Order VII is the judge of that division, and it does not appear that the Chief Justice can give any direction under rule 5 or make any order under rule 6 unless the action is in his own division, so that he is the judge of the division where the action lies. That is not the case here, and all that I can do in this matter as Acting Chief Justice is to order a transfer under section 73. In view of the fact that section 73 is the section which was relied on in opposition to the defendant's application in Kano, and that an adjournment was ordered there for the express purpose of applying to the Chief Justice for an order of transfer under section 73, I think it proper now to order the amendment of application before me to make it an application for an order under section 73 transferring the action from the judge of the Kano Judicial Division to a judge in the Jos Judicial Division, and I order accordingly.

Mr Pickford, for the plaintiff-respondent, submits that section 73 does not give the Chief Justice power to make an order of the kind now sought—that is, in effect, an order transferring a cause from one judicial division to another. The submission is that section 73 provides, and provides only, for the case where it is required that proceedings be taken before one individual judge in preference to another individual judge, for some particular reason, for example, the indisposition of the one judge or the fact that he may have some interest in the proceedings, or the special qualifications of the other judge to entertain proceedings of that particular kind. There is no doubt that section 73 empowers the Chief Justice to make an order transferring proceedings between individual judges for such purposes, but in my opinion the section is not confined to orders of that sort. Section 73 must be read along with section 68 and section 69. Section 69 provides for the constitution of judicial divisions on a territorial basis, and section 68, in subsection (2) (*a*), requires the Chief Justice to direct one or more judges to sit in one or more judicial divisions. Once judicial divisions have been constituted, the Chief Justice is bound by the terms of section 68 (2) (*a*) to direct each judge to sit in a particular division or divisions. Section 73 is to be read with reference to sections 68 and 69 and to the circumstances created by those sections; that is to say, it operates in, and is to be read in the light of, a state of affairs where several territorial divisions

exist and the judges are distributed among them. Section 73 empowers the Chief Justice to transfer a case from any judge whatever to any other judge whatever, and therefore it necessarily empowers the Chief Justice to make an order for a transfer from a judge sitting in one division to a judge sitting in another division. For that reason I have no doubt that I have power to order a transfer in this case.

The next question is whether I should so order. The defendant's affidavit discloses that the partnership was carried on at Jos, the firm's bank account was kept at Jos, and all the books and records of the firm are in Jos. Counsel informs me that the business of the partnership was that of building and engineering contractors, and I infer from that that the partnership assets, including immovable property and plant, are at Jos where the partnership was carried on. The defendant's affidavit also avers that he is at present residing at Jos. In reply, the plaintiff, in a counter-affidavit, says that the defendant visits Kano from time to time and that he resided in Kano for a period of some five or six months during the continuance of the partnership, which was a matter of over two years. The plaintiff also says that his own business is now in Kano, his solicitors are in Kano, the partnership's auditors have a branch in Kano, and the plaintiff's counsel is in Kano. It is clear to me that for every reason I ought to order this transfer. The proper venue for the action appears to be Jos. Mr Pickford submits that the action amounts to no more than the claim for £11,700 due upon the dissolution of the partnership, and that the venue is therefore at Kano where the creditor resides and is to be paid. But there is more than that to the action. The plaintiff asks for the appointment of a manager and receiver. He asks for an account to be taken and he asks for an injunction. All those claims are relief which can best be afforded by the court of the Jos Judicial Division. Apart from considerations of venue, the balance of convenience is clearly in favour of this action being heard and determined in Jos where the defendant resides and the partnership property and books are; and I will make an order for the transfer of the action from the judge of the Kano Judicial Division to a judge in the Jos Judicial Division.

Application granted.

DAVID AWANI *v* COMMISSIONER OF POLICE, NORTHERN REGION

[C. A. (Smith Ag. S.P.J. and Reed J.) February 1, 1958]
[Jos—Criminal Appeal No. JD/69CA/1957]

Conviction for money lending—eight separate charges—single finding made in respect of all.

The appellant was charged with eight separate offences under section 5 (*b*) of the Moneylenders Ordinance. In his judgment the magistrate treated them as one composite offence and made a single finding in respect of all.

Held: It was the magistrate's duty to make a finding in respect of each charge, and the trial was a nullity.

CRIMINAL APPEAL

Prest for the appellant;

Alcock, *Crown Counsel*, for the respondent.

Smith, Ag. S.P.J. (delivering the judgment of the Court): The appellant was prosecuted before the Chief Magistrate, Jos on eight separate offences, each contrary to section 5 (*b*) of the Moneylenders Ordinance.

At the close of the case for the defence counsel submitted that 'all the counts in the charge could and should have been comprised in one count'. Commenting on this submission the Chief Magistrate said at the beginning of his judgment:—

> "The accused is charged with eight counts of carrying on business as a moneylender, without being in possession of a moneylender's licence between August, 1956 and May, 1957. While there does not appear to have been anything technically wrong in the prosecution dividing up the period by months so as to charge accused on a number of counts it would have been simpler and fairer to accused to charge him on one count of carrying on business as a moneylender between August, 1956 and May, 1957".

After considering the evidence he came to the conclusion that the appellant "was undoubtedly guilty under section 5 (*b*) of Cap. 136". He then proceeded to convict the appellant in these words:

> "As I said at the beginning of the judgment accused should have been charged on one count only and I propose to treat the whole charge as one of carrying on business as a moneylender without a licence and find him guilty as such."

and sentenced him to a fine of £50.

Mr Prest, for the appellant, submitted that the Chief Magistrate erred in law in that he failed to return a verdict on each of the counts in the charge. Mr Alcock, for the respondent, conceded that it was the duty of the Chief Magistrate to return a separate verdict on each offence.

The charge as framed contained eight separate offences each contrary to the same section of the Moneylenders' Ordinance. There should have been a separate verdict on each of these offences. On his findings of fact the Chief Magistrate might have returned a verdict of guilty on some of the counts and a verdict of not guilty on others. Instead he treated the eight offences in his judgment as one composite offence, and returned a single verdict for an offence which he thought the prosecution ought to have charged. He had no power to do this. In the exercise of his jurisdiction it was his duty to return a verdict on each of the eight offences as framed. The conviction as recorded is a nullity; and consequently the trial was incomplete and abortive. We consider that this is a case where in the exercise of our powers under section 48 (*a*) (*i*) of the Northern Region High Court Law we should order a retrial.

The conviction as recorded is quashed and the fine of £50, if paid, is to be returned to the appellant. We order a fresh trial on the same charge before another magistrate.

Conviction quashed.
Retrial ordered.

SAMUEL ONOJASI *v* COMMISSIONER OF POLICE, NORTHERN REGION

[C.A. (Smith Ag., S.P.J. and Reed J.) February 1, 1958
[Jos—Criminal Appeal No. JD/56CA/1957]

Minerals Ordinance (*Cap.* 134)—*definition of "tailing" in section* 2—*definition of "controlled mineral" in section* 65.

The appellant was convicted of (1) receiving 140 bags of "tailings containing cassiterite and columbite" knowing them to have been stolen, contrary to section 427 of the Criminal Code; (2) being in possession of controlled mineral, contrary to section 66 of the Minerals Ordinance. The contents of the bags were described in the charge as "tailings containing cassiterite and columbite"; they were also described as "tailings" in the evidence. But the evidence showed that, when assayed, they contained 1 per cent of tin and 5½ per cent of combined columbite and tantalite.

Held:

(1) The definitions of "tailing", "mineral", and "controlled mineral" are mutually exclusive.

(2) When a substance contains a proportion of controlled mineral it is a "controlled mineral" within the meaning of the definition.

CRIMINAL APPEAL

Eso for the appellant;
Alcock, Crown Counsel, for the respondent.

Smith, Ag. S.P.J. (delivering the judgment of the Court), said that the evidence did not support the finding of guilty upon the first charge, and continued:

The appeal against conviction on the second offence contrary to section 66 of the Minerals Ordinance turns on the meaning of the definitions of "tailing" and "controlled mineral". "Tailing", as defined in section 2, "means all gravel, sand, slime or other substance which is the residue of *bona fide* mining operations". "Controlled mineral", as defined in section 65, means *inter alia* "(*a*) the ores of tin, columbium, tantalum, tungsten and zinc".

Mr Eso for the appellant has argued that the bags contained tailings and were described as such by Ummankwe who examined the samples; that they were the residue of mining operations and were tailings within the definition in section 2 and not controlled minerals within section 65.

Where the contents of the bags came from we do not know. But we do know that they did not come from the mining lease of which the appellant was overseer and that he was in unlawful possession thereof. The contents weighed 9,615 lbs. and when assayed were found to contain 1 per cent of tin and $5\frac{1}{2}$ per cent of combined pentoxides (that is columbite and tantalite) to the value of £225 19*s* 2*d*. It is true that the contents of the bags were described in evidence as tailings, and were described in the charge as "tailings containing cassiterite and columbite". But the fact is that they contained a proportion of controlled minerals and of other minerals of the zircon type.

We are of opinion that the definitions of "tailing", "mineral" and "controlled mineral" are mutually exclusive. The definition of "tailing" shows that it only includes such substances as do not fall within the definition of "mineral" and of these columbium, tantalum and tin are included in the definition of "controlled mineral" in section 65 (*a*). Where a substance contains a proportion of controlled mineral that in our view is a controlled mineral within the definition.

For the reasons given we quash the conviction and set aside the sentence on the first offence charged and dismiss the appeal on the second offence.

Appeal dismissed in part.

S. RACCAH *v* ABDEL WAHAB

[High Court (Bate J.) January 9, 1958]
[Kano—Motion in Civil Suit K/105/1957]

Motion in the High Court in Kano for a garnishee Order against a garnishee in Maiduguri—omission from the applicant's affidavit of any paragraph corresponding to paragraph 4 of Form 25 of the Schedule of the Sheriffs and Enforcement of Judgments and Orders Ordinance (Cap. 205)—requirements as to venue of rule 2 of Order VIII of the Judgments (Enforcement) Rules.

A judgment creditor applied in Kano for a garnishee order to be served in Maiduguri. By rule 2 of Order VIII of the Judgments (Enforcement) Rules garnishee proceedings may be taken in any court in which the judgment debtor could sue the garnishee in respect of the debt. The judgment creditor's affidavit did not say that the judgment debtor could sue the garnishee in Kano.

Counsel for the applicant submitted that the affidavit was not required to show that the court in Kano had jurisdiction to entertain the proceedings. He contended, firstly, that the application could be made to the High Court in Kano and the Chief Justice could then transfer it to Maiduguri under section 73 of the High Court Law. Secondly, he relied on rule 5 of Order VII of the Supreme Court (Civil Procedure) Rules as showing that it was open to the court in Kano to make the garnishee order *nisi* leaving it to the garnishee to submit to the court's jurisdiction or not.

Held:

(1) The fact that the Chief Justice has a power of transfer under section 73 of the High Court Law could not justify the court in Kano in permitting the applicant knowingly to take proceedings contrary to rule 2 of Order VIII of the Judgments (Enforcement) Rules.

(2) The word "suit" in rule 5 or Order VII of the Supreme Court (Civil Procedure) Rules is not wide enough to cover garnishee proceedings, which are "a species of execution" and ancillary to a suit.

(3) Even if rule 5 of Order VII of the Supreme Court (Civil Procedure) Rules was applicable, rule 2 of Order VIII of the Judgments (Enforcement) Rules cannot be ignored; and the court would have to transfer the proceedings to the appropriate judicial division, whether the garnishee pleaded in objection to the court's jurisdiction or not.

MOTION

Noel Grey for applicant;

Defendant in person.

Bate J. The judgment creditor has applied for a garnishee order against Barclays Bank D.C.O., Maiduguri. Paragraphs 1-4 of the applicant's affidavit follow, as required by Order VIII, rule 3, of the Judgments (Enforcement) Rules, paragraphs 1-3 of Form 25 in the Schedule to the Sheriffs and Civil Process Ordinance. In paragraphs 3 and 4 the applicant deposes to his belief that the garnishee is presently indebted to the judgment debtor. But, although paragraph 5 shows that the garnishee does not reside within the Kano Judicial Division, no paragraph corresponding to paragraph 4 of Form 25 has been added to show that this court has jurisdiction to entertain the proceedings. This is a significant omission since Order VIII, rule 2 of the Judgments (Enforcement) Rules makes express provision with regard to venue in garnishee proceedings. Rule 2, in so far as it applies to the circumstances of this application, provides that garnishee proceeding may be taken in any court in which the judgment debtor could under Order VII of the Supreme Court (Civil Procedure) Rules sue the garnishee in respect of the debt.

I conclude from Order VII, rules 1-4 of the Supreme Court (Civil Procedure) Rules that the judgment debtor in this case could not sue the garnishee in respect of his debt in the Kano Judicial Division. The proper venue would be a court having jurisdiction in the judicial division in which Maiduguri is situated. Rules 3 and 9 of Order VIII of the Judgments (Enforcement) Rules show that the possibility of garnishee proceedings being taken in a court other than that in which judgment was given was in contemplation at the time when the rules were created.

But Counsel for the applicant has submitted that it is unnecessary for the applicant to show in his affidavit that this court has jurisdiction to entertain the proceedings. He relies in the first place on the Northern Region High Court Law, 1955, s. 73 which enables the Chief Justice at any time before judgment and either with or without the application of a party to transfer a cause or matter before a judge to any other judge. I do not however consider that the fact that the Chief Justice has a power of transfer would justify this court in permitting the applicant to take proceedings deliberately and knowingly contrary to Order VIII, r. 2 of the Judgments (Enforcement) Rules.

Raccah v Wahab

Bate, J.

Counsel relies secondly on the Supreme Court (Civil Procedure) Rules, Order VII, r. 5. He submits that it is open to the court to make a garnishee order *nisi* and the garnishee may then either submit to the jurisdiction of the court or object to the jurisdiction. I am unable to accept this interpretation of rule 5 for two reasons. Rule 5 is expressed to apply to cases where a "suit" has been commenced in the wrong judicial division. The precise scope of the word "suit" is not clear but I have no reason to suppose that it is wide enough to include garnishee proceedings which were described by Vaughan Williams L. J. in White, Son and Pill *v* Stennings, 1911, 2 K.B. 418 as "a species of execution" and which are necessarily ancillary to a suit. The suit to which the judgment creditor's application is ancillary was not apparently commenced in the wrong division. Consequently rule 5 does not apply. And even if it were held to be applicable, I am again of opinion that the court could not with propriety ignore Order VII, rule 2 of the Judgments (Enforcement) Rules but would be obliged to transfer the proceedings to the appropriate division, whether or not the garnishee pleaded in objection to the jurisdiction.

I am for these reasons compelled to the conclusion that this court has no jurisdiction to entertain the judgment creditor's application which is therefore dismissed. I reach this conclusion with regret since it would probably be more convenient for the parties and would certainly avoid delay if proceedings could be taken here.

Application dismissed.

GARBA DAN IBANI *v* KANO NATIVE AUTHORITY

[C. A. (Sir Algernon Brown C. J. and Bate J.) February 25, 1958]

(Assessors:—M. Yahaya, Chief Alkali of Sokoto; M. Musa, Chief Alkali of Bida.)

(Kaduna—Criminal Appeal No. K/63A/1957)

Appeal from the decision of the Moslem Court of Appeal dismissing an appeal against a conviction for wilful homicide—proof of wilful homicide required by Maliki law—confession to accidental killing—observations on the importance attached by Maliki law to the form of proof as opposed to the substance.

There was no witness to the facts, circumstantial or otherwise. There were no *kasama* oaths. But 10 witnesses testified to a confession which the appellant had made to the District Head that he had killed the deceased *accidentally*. The wounds which were found on the deceased appeared to negative the suggestion of accident. The trial court found the appellant guilty of wilful murder and based their finding on his confession.

Held: Maliki law requires that the offence of wilful homicide (*amd*) should be proved in one of these ways: (1) a confession that the homicide was intentional; or (2) two eye witnesses; or (3) one witness supported by the oath of a blood relative that he is a reliable witness, and 50 *kasama* oaths. None of these requirements was present in this case. Neither the trial court nor the Moslem Court of Appeal appear to have appreciated that this was not a confession to wilful killing (*amd*) but to accidental killing (*khata*).

CRIMINAL APPEAL FROM MOSLEM COURT OF APPEAL

Pickford for the appellant;

Kayode Eso for the respondent.

Brown, C.J. (delivering the judgment of the Court): This appellant was convicted of the wilful murder of Umaru. In the "Particulars of Offence", it was stated that Umaru and his brother Haruna took their cattle on to the appellant's farm where they ate some "Gamba" grass, and that the appellant came with a hoe and chased the two boys first

Ibani v. Kano N.A. Brown, C. J.

throwing a hoe at Haruna who escaped. The statement then goes on to say that when Umaru did not return his brothers accused the appellant of the murder and that he did not deny it; and that they made him take them to the spot where Umaru's body was found.

This was the account which was set out in the "Particulars of Offence". No witness was called to substantiate it. No witness to any fact was called. No *kasama* oaths were taken. But 10 witnesses were called who said that when the appellant was taken before the District Head he confessed to killing Umaru but said that he did so accidentally. Six of the witnesses said that he admitted that the hoe which was produced was his, and that he further admitted chasing the two boys. Three wounds were found on the deceased—on the neck, stomach and ear.

At the trial he denied the murder, and denied making any confession. This attitude he maintained before the Moslem Court of Appeal. He said that he never saw the boys. He said that the deceased's relatives pushed him to the spot where the deceased was found and said that he had killed their brother. He said that they were falsely accusing him because he was a poor man. He made no objection to any of the 10 witnesses to his confession on the ground of their incapacity as witnesses.

The judgment of the trial court says:—

> "When the murderer has confessed to the wilful murder and continued with the confession or he recants and denies it and two unimpeachable witnesses testify to hearing his confession he shall be killed without the need for *kasama* oath."

And they quote the authority for that propositon as the Dasuki commentary, Volume 4, page 291. They then go on to say: "This murder is wilful and malicious, and ten witnesses have testified to Garba's confession".

But the confession was to an *accidental* killing (*khata*). And in acting upon an authority which refers to wilful killing (*amd*) they were clearly misdirecting themselves. The prosecution case may be summarised as follows:—

(1) No eye-witness, circumstantial or otherwise.

(2) No *kasama* oaths.

(3) A confession, proved by 10 witnesses, of '*khata*' and not of '*amd*'.

(4) A confession that he chased the two boys, and that the hoe belonged to him.

(5) Three wounds which would appear to negative the suggestion of an accident.

But in Maliki law the *form* of proof is essential. The *substance* of proof, which in this case might well be afforded by (*a*) his admission that he chased the boys with the hoe, (*b*) the three wounds, will not avail the prosecution if the *form* of proof is lacking. Maliki law requires that '*amd*' (intentional homicide) must be proved in one of three forms: (1) a confession that the homicide was intentional; or (2) two eye-witnesses; or (3) one witness supported by the oath of a blood relative that he is a reliable witness and 50 *kasama* oaths. None of these three forms of proof exist in this case. The Moslem Court of Appeal do not appear to have appreciated that this was not a confession to wilful murder but to '*khata*'. They conclude their judgment by saying: "this murder is intentional." We ask: by which of the three forms of proof required by Maliki law was it proved that the killing was intentional? Our Assessors advise us that by none of the three forms required by Maliki law was this killing proved to have been intentional; and we have no option but to allow this appeal.

The conviction and sentence are set aside, and the appellant is discharged.

Appeal allowed.

SHEHU DAN HAZO FAGAWA *v* KANO NATIVE AUTHORITY

[C. A. (Sir Algernon Brown C. J. and Bate J.) March 1, 1958]
(Assessors: M. Yahaya, Chief Alkali of Sokoto, M. Musa, Chief Alkali of Bida.)

(Kaduna—Criminal Appeal No. Z/55A/1957)

Appeal from the decision of the Moslem Court of Appeal dismissing an appeal against a conviction for homicide—one circumstantial witness and 50 *kasama oaths—requirement of Maliki law that* 25 *kasama oaths should be taken by the deceased's son if he has reached the age of puberty—where two or more persons commit a homicide, which is not committed as a result of a conspiracy, view taken by Maliki law regarding the responsibility of the person who struck the more serious blows—introduction in the judgment of the Moslem Court of Appeal of new matter not contained in their record.*

One witness, Adamu Na Labi, saw the appellant and one Bila attacking the deceased with *marke* sticks. He tried to stop them, thus diverting the appellant's attack on to himself. He ran to make a report to the deceased's relatives. When they came back they found that the deceased was dead with four wounds on his body. Adamu Na Labi gave evidence of the attack which he had seen. He did not, and could not, give evidence that the blow struck by the appellant was of such a nature as to cause the death of the deceased, because he was not present when the deceased was killed. There was no evidence of whether the appellant or Bila killed the deceased, or of who struck the more serious blows in the murderous attack which must have followed the attack by both men which Adamu Na Labi had seen and tried to stop.

The circumstantial evidence which Adamu Na Labi gave was supported by the oath of a blood relative to the effect that Adamu Na Labi was a reliable witness, and by 50 *kasama* oaths to the effect that the deceased had been killed by the appellant with *marke* sticks. These *kasama* oaths were taken by two men who were the deceased's brothers. But the deceased had left one son, though the record contained no indication of his age.

In dismissing his appeal the Moslem Court of Appeal had referred to their judgment to an allegation which the appellant had apparently made to them, but not to the trial court, that Adamu Na Labi had been suspected of the murder and had

been sentenced to two years imprisonment. No mention of this allegation was to be found in the record of the appellant's statement which he made before the Moslem Court of Appeal

Held:

(1) In Maliki law the importance of the *kasama* oaths is such that they are accepted as a substitute for direct evidence.

(2) If the deceased's son had reached the age of puberty Maliki law requires that he should take 25 *kasama* oaths.

(3) In the light of (1) above the requirements of Maliki law regarding the *kasama* oaths must be rigidly complied with; and in the absence of any indication of the age of the deceased's son it was impossible to say if this requirement had been satisfied.

(4) Where two or more persons commit a murder in circumstances not amounting to a conspiracy to murder, Maliki law holds the person who struck the more serious blows as being accountable for the death. As there was no evidence that the appellant had struck the more serious blows, or any blow at all, in the attack which caused the death of the deceased, his accountability for the death could only depend upon the 50 *kasama* oaths which took the place of direct evidence.

(5) The judgment of the Moslem Court of Appeal had introduced new matter which was not supported by their record of proceedings and required investigation.

[*Editorial Note.*—This is the second case in which the High Court has commented on the importance which Maliki law attaches to the *form* of proof as opposed to the *substance*. The other case is *Garba Dan Ibani v Kano N.A.*, which is also reported in this volume. The two cases present a striking contrast. In *Garba Dan Ibani's case* the appellant had admitted in the presence of 10 witnesses that the hoe with which the death had been caused belonged to him; he admitted that he had chased the deceased and killed him; but he insisted that he had killed him accidentally and not wilfully. Three wounds were found on the deceased, which would appear to negative his defence of accident. Here surely the *substance* of proof is to be found? But the *forms* of proof which Maliki law requires were lacking. There were no witnesses (except to the confession to *khata*); no *kasama* oaths; no confession to intentional *homicide* (*amd*).

Fagawa v Kano N.A. Brown, C. J.

In the present case, *Shehu Dan Hazo Fagawa v Kano N.A.*, the *form* of proof required by Maliki law was complete (subject to the doubt about the age of the deceased's son and his capacity to take the 25 *kasama* oaths). There was one circumstantial witness whose "testimony was completed" by the oath of a blood relative of the deceased to the effect that the witness was reliable; and there were the 50 *kasama* oaths. But what of the *substance* of proof? The only evidence was that of the circumstantial witness who saw the appellant and Bila attack the deceased with *marke* sticks. What happened after that attack we do not know; because the witness, after trying to stop the two men and after parrying with his axe (which he left on the ground) an attack on himself by the appellant, ran away and saw no more. We only know that one of the "washers" testified that the wounds were caused by the *marke* sticks and not by the axe. But what happened after the witness, who had diverted the appellant from attacking the deceased, had run away? Did the appellant and Bila both resume their attack upon the deceased and cause his death? If so, who struck the more serious blows? Did the appellant strike a blow at all after the witness had left? There is no evidence to enable us to answer these questions. In the place of evidence which might or might not provide the *substance* of proof we have the *form* of proof required by Maliki law in the 50 *kasama* oaths taken by two blood relatives to the effect that they were positive that the death of the deceased was caused by the appellant with *marke* sticks].

CRIMINAL APPEAL FROM MOSLEM COURT OF APPEAL

Pickford for the appellant;

Kayode Eso for the respondent.

Brown, C.J. (delivering the judgment of the Court): This appellant was convicted by the Emir of Kano's Court of the homicide of Kaka. The conviction rests upon—

(1) the evidence of one circumstantial witness (*lauth*), Adamu Na Labi, who saw the appellant and Bila attacking and pursuing the deceased with *marke* sticks, but did not see the murder committed;

(2) the oath of a blood relative that Adamu Na Labi was a reliable witness;

(3) 50 *kasama* oaths.

The evidence that Adamu Na Labi gave was that he saw the appellant and Bila attack Kaka with *marke* sticks, and he saw Kaka run away pursued by the two men. Adamu

Na Labi himself was carrying an axe and tried to stop them. The appellant attacked him and he parried the blow with his axe, which fell to the ground. He left his axe on the ground and ran to make a report to Kaka's relatives. When they came back they found Kaka's dead body. There were four wounds: one on the chest; one above and one below the navel; and one on the right arm which (to quote the words of one of the washers) "had actually chopped it". The trial court put the question: "What sort of wounds are they?" The washer replied: "They are from beatings by sticks."

The first ground of appeal is that Adamu Na Labi did not see any blows likely to cause death, nor did he declare that the blows were certain to cause death. But our Assessors advise us that the blood relatives, in taking the *kasama* oaths, would swear that the deceased died as a result of the beating and that this would furnish the necessary proof in Maliki law with regard to this point.

The second ground of appeal is that, the evidence of Adamu Na Labi being circumstantial, a second witness is necessary in Maliki law to complete his proof. This was furnished and appears at the top of page 5 of the record. We are advised that the testimony of Adamu Na Labi was completed by a blood relative taking the oath that Adamu Na Labi was a reliable witness which was followed by 50 *kasama* oaths. And we are further advised that, with regard to ground (3) which shows that Adamu Na Labi was "an ordinary and honourable witness, not an irreproachable or exceptional witness" the oath of the blood relative and the 50 *kasama* oaths were sufficient to complete his testimony.

The immense importance which Maliki law attaches to the *oath* is illustrated by the following question which we put to the Assessors and their answers:

Q. Would the blood relatives have taken the *kasama* oaths if they had any doubt that the killing was done with the *marke* sticks and not with the axe?

A. Never.

Thus if there is one witness, even though his evidence is circumstantial, supported by the oath of a blood relative that his evidence is reliable, and supported further by the 50 *kasama* oaths, Maliki law accepts the oaths as a substitute for direct evidence. In other words, although nobody saw the accused commit the crime but there is the evidence of one witness showing that there is a likelihood of the accused having committed the crime, Maliki law says that the blood relatives would never take the oaths if they had the slightest

Fagawa v. Kano N.A. Brown, C. J.

doubt that the accused had in fact committed it. That is Maliki law as we are advised by our Assessors, and we must accept it.

We have had occasion, in a previous case, to stress the importance which Maliki law attaches to the *form* of proof as opposed to the *substance*. When this appeal came on for hearing on the first day of the Sessions, our Assessors advised us that if the dead man's only surviving son had reached the age of puberty Maliki law requires that he should take 25 *kasama* oaths, the remainder being taken by more remote relatives. If he has not attained puberty he may not take the *kasama* oaths at all. In this case Ibrahim and Na Haruna, who are the deceased's brothers, took the *kasama* oaths. The deceased's son did not. There is nothing on the record to indicate the age of the deceased's son. We therefore adjourned the hearing of this appeal part heard in order that evidence might be called of the age of the boy. The witness who was called in this Court was Abdul Mumini son of Sule. He was not a satisfactory witness. Having regard to the importance of being fully satisfied that the *kasama* oaths were properly taken by the proper persons and that Kaka's son was not capable of taking them on account of his age, we have come to the conclusion that this case must be sent back to the trial court in order that this matter may be cleared up beyond a doubt. For this purpose the trial court will no doubt insist upon the boy being produced before them.

But that is not the only difficulty in this case. One difficulty arises from the judgment of the Moslem Court of Appeal. They say—

> "With regard to your criticism of Adamu Na Labi's evidence, where you alleged that he was suspected of the murder with the result that he was sentenced to two years imprisonment we have not seen this in the proceedings sent to us by the Emir of Kano's court."

But we can find nothing in the record of proceedings before the Moslem Court of Appeal to show that he made this allegation before them. If this is the appellant's defence the trial court will no doubt consider it, and will ascertain if it is true that Adamu Na Labi was sentenced to two years imprisonment.

A much greater difficulty is whether there is any proof, apart from the *kasama* oaths, under Maliki law or any other law, that this appellant struck the more serious blow which resulted in the death of the deceased; or any evidence, apart from the *kasama* oaths, that he struck any blow at all after the attack

which Adamu Na Labi saw. We are all agreed that this was not a case of conspiracy. Shehu (the appellant) and Bila did not set out with the common purpose of murdering Kaka. They met him; they quarrelled with him; and they attacked him. That is all we know. There is no evidence (as distinct from the *kasama* oaths) to show who committed the murder which was committed after the attack. If both Shehu and Bila, after the attack which Adamu Na Labi saw, both attacked Kaka again and killed him, there is no evidence of who struck the more serious blows; and in this connection we refer to page 208 of Volume 2 of Jawahiral Ihlil, in which it is stated that the person who struck the more serious blows must be held accountable for the death. There is no evidence that Shehu struck the more serious blow or that he struck any blow at all after the attack which Adamu Na Labi witnessed, which was not a murderous attack and did not cause the death of the deceased. In this connection we would particularly refer to the opinion of Imam Lahmi in Volume 4 of the Da Suki Commentary on Dardiri at page 217 in the Chapter on Homicide and Wounding.

We have indicated three matters upon which further investigation is required. They are:—

(*i*) Whether Kaka's son has reached the age of puberty and whether the *kasama* oaths were taken by the proper persons;

(*ii*) the passage from the Moslem Court of Appeal judgment which is not supported by their record;

(*iii*) whether there is any evidence, as required by Maliki law, that this appellant struck the more serious blows which caused the deceased's death.

We have come to the conclusion that we should act under Section 67 (1) (*b*) (*ii*) of the Native Courts Law, 1956, and order a retrial by a court of competent jurisdiction. For the purpose of guidance we think it right to point out that this means a retrial of the whole case as if the first trial had not taken place. In this connection, we would refer to the case of Mai Rai *v* Bauchi Native Authority, 1957, N.R.N.L.R. 115. We see no reason why the case should not be retried by the Emir of Kano's court and we order accordingly.

Re-trial ordered.

COMMISSIONER OF POLICE *v* MOMO GARKO

[C.A. (Brown C.J., Smith Ag. S.P.J.) March 27, 1958]

[Jos—Criminal Appeal (Case Stated) No. JD/10CA/1958]

Definition of 'stage carriage' in section 2 of Road Traffic Ordinance—Whether carrying passenger for hire or reward on one occasion only brings vehicle within the definition—Section 5(a) of Motor Vehicles (Third Party Insurance) Ordinance, Cap. 139, compared with section 35(4) of Road Traffic Act, 1930.

The following facts are taken from the judgment:—

The accused pleaded guilty on the first charge to negligent driving, contrary to section 18 (1) of the Road Traffic Ordinance; and on the second charge to carrying passengers and loads for reward without having a stage carriage licence, contrary to Regulation 67 (g) of the Road Traffic Regulations. He pleaded not guilty to a third charge of using a motor vehicle without a policy of insurance in respect of third party risks, contrary to section 3 (1) of the Motor Vehicles (Third Party Insurance) Ordinance.

The accused was the driver of a kitcar belonging to the Ministry of Health. He was on an authorised journey from Kaduna to Wukari carrying departmental loads; and he did not deviate from his authorised route. At Lafia he picked up two passengers who paid 2*s* each to be taken to Makurdi and five bags of guinea corn for the same journey for which he was paid 1*s* a bag. He was expressly forbidden by the Department to carry unauthorised loads or passengers. On the way to Makurdi he lost control of his vehicle, which mounted a heap of laterite and overturned.

The learned magistrate put the following questions for the consideration of the court:—

> "(1) Does the fact that accused carried unauthorised passengers for reward constitute using the vehicle as a stage carriage?
>
> (2) If so, does that deprive the vehicle of the exemption from insurance conferred by s. 5 (*a*) of the Motor Vehicles (Third Party Insurance) Ordinance, or does the High Court hold the view that, the journey being an authorised one and the vehicle not having deviated from the proper course, the vehicle was still "being used for the purposes of the Government owning it"?"

Held: The definition of "stage carriage" in the Road Traffic Ordinance implies some element of regularity in the use of the vehicle as a stage carriage; and that whether a vehicle comes within the definition at any particular time is a question of fact which must depend upon the circumstances of each particular case. In the present case the vehicle was not being used as a stage carriage.

Per Curiam: The fact that a vehicle was being used as a stage carriage would not deprive it of the exemption from insurance conferred by section 5 (*a*) of the Motor Vehicles (Third Party Insurance) Ordinance, if the vehicle was still "being used for the purposes of the government owning it".

Cases referred to:

Wyatt v Guildhall Insurance Company Limited, (1937) 1 *K.B.* 653.

Bonham v Zurich General Accident and Liability Insurance Company, Limited, (1945) 1 *K.B.* 292;

Limpus v London General Omnibus Co., 32 L.J. Ex. 34; 11 W.R. 149.

Gwilliam v Twist, (1895) 1 Q.B. 557.

Conway v George Wimpey, (1951) 2 K.B. 266; (1951) 1 A.E.R. 363.

Salt. v MacKnight, (1947) S.C. (J).

Twine v Beans Express Ltd., (1946) 1 A.E.R. 202.

CASE STATED

Alcock for the Crown. Stage carriage defined in section 2 of the Road Traffic Ordinance. This departmental kitcar is designed to carry less than 8 passengers. "Any motor vehicle" a very wide term which includes a kitcar. "Hire or reward". *Bonham v Zurich General Accident and Liability Insurance Co.* (1945) K.B. 292—reads from head note. "Hire or reward" defined p. 297 and referred to Davies on the Law of Road Traffic 2nd Ed. p. 355. Respondent carrying passengers for reward. On the second question vehicle covered by section 5 (*a*) of Cap. 139. This was a government vehicle owned by Ministry of Health. Driver prohibited from carrying passengers. He entered into a contract outside the scope of his employment—He did an act outside the scope of his employment. Clerk and Lindsell 11th Ed. p. 123 para. 196. When driver took on passengers he was doing something prohibited and unconnected with his employment of driving a vehicle conveying loads.

C. of P. v Garko — Brown, C.J.

[*Chief Justice:* Whatever the driver may have been doing, what was the user of the vehicle at the time? Was the vehicle at the time being used for the purposes of government?]

The vehicle was not insured for those two passengers. By acting outside the scope of his employment the vehicle was outside the scope of the exemption of section 5 (*a*). *Limpus v London General Omnibus Co.*, (1862) 32 L.J. Exchequer Reports 34. *Gwilliam v Twist*, (1895) 1 Q.B. 557. *Conway v George Wimpey*, (1951) 2 K.B. 266; (1951) 1 A.E.R. 363. The user was the conveyance of loads for the Ministry; at Lafia he does an act outside the scope of his employment by picking up passengers and loads—here was a second user.

[*Chief Justice:* The vehicle was still being used for government purposes. That is the point here.]

Salt v MacKnight, (1947) S.C. (J); the Court of Justiciary mentioned in Davies Road Traffic p. 325 note 3; section 35 (1) of Road Traffic Act corresponds to our section 5 (*a*).

Gould for the respondent: dealing first with question 2, *Twine v Beans Express Ltd.*, (1946) 1 A.E.R. 202, on scope of employment. *Conway's* case is merely *semble* not a direct authority. If scope of employment does not apply, we come to the terms of section 5 (*a*) of Cap. 139. Section 5 (*a*) not *in pari materia* with section 35 (4) of Road Traffic Ordinance 1930. Driver authorised; driver on authorised road. Only prohibited act was to put up passengers. As long as general purposes was government use then any act committed by servant—which is only incidental—would not be sufficient to remove protection of section 5 (*a*). Purpose for which vehicle was being used had not been changed. Clerk and Lindsell 10 Ed. p. 117. Section 5 (*a*) must be construed strictly. On question 1 *Bonham's* case—it was a regular habit to carry passengers. Must be evidence of regularity. *Wyatt v Guildhall Insurance Co. Ltd.*, (1937) 1 K.B. per Branson J. p. 662. In the case stated no evidence of system. Only evidence of one incident. Not carrying for reward. Definition of stage carriage did not apply; stage carriage defined in English Road Traffic Act in section 61.

Brown C.J. (delivering the judgment of the Court) stated the facts and continued:—

With regard to the first question, "stage carriage" in section 2 of the Ordinance is defined as meaning:—

> "Any motor vehicle used or intended to be used for carrying passengers for hire or reward other than such a vehicle constructed or adapted to carry less than

eight persons, the passengers paying separate and distinct fares or at the rate of separate or distinct fares for their respective places, and shall be deemed to include the expression 'omnibus'."

It is agreed that we are not concerned with that part of the definition which refers to the exception relating to a vehicle which is constructed or adapted to carry less than eight persons. The vehicle was a kitcar; and the exception does not apply. The short point for our decision upon the first question is whether a single act of using the motor vehicle for carrying passengers for hire or reward requires the vehicle to be licensed as a "stage carriage" or whether some degree of regularity of user as a "stage carriage" is required to bring the vehicle within the scope of the definition.

A similar point was considered in *Wyatt v Guildhall Insurance Company, Limited*, (1937) 1 K.B. 653, in relation to proviso (*ii*) of section 36 (1) of the Road Traffic Act, 1930, by which the policy of insurance against third-party risks (prescribed by section 35 of that Act) is not required to cover "*except in the case of a vehicle in which passengers are carried for hire or reward* . . . . liability in respect of the death of or bodily injury to persons being carried in . . . . the vehicle at the time of the occurrence of the event out of which the claims arise". Thus, in the case of a vehicle in which passengers *are* carried for hire or reward that proviso in the Road Traffic Act, 1930, requires that the vehicle should be covered by third-party insurance. In *Wyatt's* case, the insured person had a private motor car policy which covered the use of the car "for social domestic and pleasure purposes" and excluded its use for "hiring". On an isolated occasion he carried two passengers from Manchester to London for a money payment and had an accident in which one of the passengers was injured. Counsel for the plaintiff contended that the car was not being used for "hiring" and did not therefore fall within the exclusion reserved in the policy. He contended that it was being used to carry passengers "for hire or reward" and that it was therefore covered by the policy as the Act required. Branson J. could see no distinction between "hire" and "reward". It is unnecessary in the present case that we should express a view on that point. The words in the definition of "stage carriage" which we have to consider are "any motor vehicle used or intended to be used for carrying passengers for hire or reward". The material words in the proviso to the subsection which Branson J. was considering were similar, viz. "except in the case of a vehicle in which passengers are being carried for hire or reward". He expressed

C. of P. v. Garko — Brown, C. J.

his view of the meaning of those words in the following terms (at page 662):—

> "I think that this subsection is really dealing with vehicles normally or habitually used in the way mentioned in the exception, and that the mere fact that on an isolated occasion a man takes some reward—not necessarily a monetary reward—for the conveyance of a passenger in his car does not render him liable to a penalty for not having an insurance policy covering that passenger on that occasion. Two constructions may be possible, but as this is a penal statute one leans against the construction which would turn the user of the car into criminal user".

In *Bonham v Zurich General Accident and Liability Insurance Company Limited*, (1945) 1 K.B. 292, the owner of a motor car had insured it against third-party risks by a policy which provided that the insurers should not be liable in respect of any accident or damage while the car was being used otherwise than for "social domestic and pleasure purposes, and use by the insured in connexion with his business". The insured owner drove to and from his place of business every week-day, and for a long time he had made a regular practice of taking with him, there and back, three passengers who were employed in the same works. There was no contract between them, but two of the passengers used regularly to pay a small sum based on the cost of the return railway fare between the two towns. Here, then, there was an element of regularity; which in *Wyatt's* case there was not. And the Court of Appeal held that, upon the facts of that case, the vehicle was being used to carry passengers for reward. We would observe in passing that Uthwatt J. in that case did not appear to share the view taken by Branson J. that no distinction was to be made between "hire" and "reward". But, upon the question which we have to determine, the following passage from the judgment of Uthwatt J. appears to us to contain the correct approach:—

> "Whether he was carrying for reward in those circumstances is a question of fact determined by all the circumstances of the case, including the length of time over which this course of conduct (I do not call it "course of business") has gone on; the nature of the payments made, namely, cash; the exact amount of the payment, 1*s* 2*d*, and its correspondence with the railway fare covered by the same journey".

We have come to the conclusion that the definition of "stage carriage" in the Road Traffic Ordinance implies some

element of regularity in the use of the vehicle as a stage carriage; and that whether a vehicle comes within the definition at any particular time is a question of fact which must depend upon the circumstances of each particular case. The requisite degree of regularity of user might be found in the number of occasions on which the vehicle had been used to carry passengers for hire or reward. Or it might be found in the number of passengers who were being carried for reward at any one time; the total distance covered by the vehicle on its journey; the distance covered by each passenger; the amount which each passenger paid; whether he paid in cash; and whether the amount which he paid was a reasonable reward for the distance over which he was carried. These are some of the factors which, we suggest, might be material in deciding the question of fact. But in the circumstances of the present case, where the vehicle was used on an isolated occasion for carrying two passengers for 2*s* each from Lafia to Makurdi, that does not, in our opinion, constitute using the vehicle as a "stage carriage".

The answer to the first question in the case stated is therefore in the negative. But the accused pleaded guilty to the charge and was fined £5. In any event we would observe that a charge under reg. 67(*g*) was not appropriate to the facts of this case. The matter will be brought to the attention of a judge of the Jos Judicial Division for him to consider whether, in the exercise of his powers of revision under section 45 of the Magistrates' Courts Law, he should annul the conviction upon the second charge. By paragraph (*b*) of that section the effect of this will be that the fine which was imposed in respect of the second charge, if it has been paid, will be refunded.

Our answer to the first question being in the negative, the second question in the case stated does not in strictness arise. Nevertheless we think it may be convenient if we answer the question upon the assumption that the accused was using the vehicle as a "stage carriage", if only to draw attention to the difference between section 5(*a*) of the Motor Vehicles (Third Party Insurance) Ordinance and section 35(4) of the Road Traffic Act, 1930, which is the analogous sub-section in the United Kingdom Act. By section 5(*a*) a motor vehicle owned by Government is exempt from having to be covered by third-party insurance while it is being used for the purposes of the Government owning the vehicle. It is to be observed that the whole emphasis is on *user;* and provided the vehicle is being used for the purpose of the

C. of P. v Garko — Brown, C. J.

Government which owns it it is covered by the exemption. There is no dispute that in the present case, though the driver may have been acting outside the scope of his employment in carrying the two passengers for reward, the vehicle was in fact being used to carry the departmental loads from Kaduna to Wukari and was thus being employed for the purposes of the Government. Several cases were cited to us with a view to showing that the accused was acting outside the scope of his employment. In our view they can be of no materiality to section 5(*a*) as applied to the facts of this case, because it is agreed that the vehicle, at the time when the accused was acting outside the scope of his employment, was also being used for Government purposes. But section 35(4) of the Road Traffic Act, 1930, is differently worded. It exempts the vehicles of certain public authorities from the requirement of being covered by third-party insurance "at any time when the vehicle is being driven by . . . . a servant of the owner in the course of his employment . . . . " If this prosecution had been brought under section 35 of the Road Traffic Act the fact that the accused was acting outside the scope of his employment would have been material. But that fact is not material to section 5(*a*) of the Motor Vehicles (Third Party Insurance) Ordinance except in so far as it may tend to show whether or not the vehicle was being used for Government purposes. Here the use of the vehicle for Government purposes is not in question; it was carrying the loads of the Ministry of Health. Therefore, if our answer to the first question in the case stated had been in the affirmative, our answer to the second question would have been that the fact that the vehicle was being used as a "stage carriage" would not have deprived it of the exemption from insurance conferred by section 5(*a*) of the Motor Vehicles (Third Party Insurance) Ordinance, because the vehicle was still "being used for the purposes of the Government owning it."

R. A. BALOGUN *v* UNITED AFRICA COMPANY AND ANOTHER

[High Court (Reed, J.) October 24, 1957]

[Jos—Civil Suit—No. JD/19/1957]

Claim for possession of premises, and damages for ejectment —Whether tenant or licensee—No right of occupation.

By an agreement dated 18th June, 1956, the first defendants agreed to permit the plaintiff as a licensee to enter upon their petrol station at Jos "to operate the underground petrol tanks, pump and other fittings and equipment specified in the schedule hereto . . . . ". The agreement expressly stated that the plaintiff was not a tenant. Upon a claim by the plaintiff for possession of the premises against the first and second defendants and damages for ejectment against the first defendants:—

Held: that as the agreement did not confer upon the plaintiff the right to occupy the premises, nor did the nature of the acts to be done by the plaintiff require that he should occupy them, the plaintiff was a licensee and not a tenant.

Cases referred to:

Johnson Akpiri v The West African Airways Corporation, 14 W.A.C.A. 195, distinguished.

Civil Suit

Dabiri for the plaintiff;

Macdonald for the defendants.

Reed, J.: Plaintiff claims possession of premises against 1st and 2nd defendants and damages for ejectment against 1st defendant. He claims that he was the tenant of a Petrol Service Station at 1st defendant's Motor Department in Queen Elizabeth's Way, Jos, and that in or about December, 1956, 1st defendant wrongfully ejected him from the premises and put 2nd defendant into possession.

Plaintiff sues on an agreement with 1st defendant dated 18th June, 1956, Ex. 'A'. I shall assume that this agreement is binding upon 1st defendant and the first point I propose to deal with is whether, as plaintiff alleges, it creates a tenancy or whether, as 1st defendant alleges, it confers upon plaintiff a mere licence to enter upon the premises to operate Petrol Service Station equipment without the right of occupation.

Balogun v. U.A.C. and another

Reed, J.

I quote from *Halsbury's Laws of England*, Second Edition, Volume 20, page 8, paragraph 5:

> "A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a licence, and not as a lease. In deciding whether a grant amounts to a lease, or is only a licence, regard must be had to the substance of the agreement. If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is a lease; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and control of the owner, it is a licence. To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee require that he should have exclusive possession. On the other hand, the employment of words appropriate to a lease will not prevent the grant from being a licence merely, if from the whole document it appears that the possession of the property is to remain with the grantor. In order that a licence may give an exclusive right to the benefit conferred by it, it must either be expressed to be exclusive in the grant, or it must be possible to infer from the language of the grant a clear intention to that effect".

Counsel for plaintiff referred the Court to *Johnson Akpiri v The West African Airways Corporation*, 14 W.A.C.A. 195. The issue in this case was whether the appellant was a tenant or licensee of premises. The Court referred to the definition of a tenant in section 2(1) of the Recovery of Premises Ordinance as including "any person occupying premises". Counsel for respondent submitted that the appellant had no right to the "exclusive possession" but the Court held that the word "occupation" must be given its ordinary dictionary meaning.

I must, therefore, consider the substance of the agreement, Exhibit 'A', and the nature of the acts to be done by plaintiff, and decide whether plaintiff "occupied" the premises.

Now there can, in my view, be no doubt that the intention of the parties, as expressed in Exhibit 'A', was that there should be no occupation of the premises. Clause 1 expressly states that he is not a tenant but that he is permitted "as licensee" to enter upon the property "to operate the underground petrol tanks, pumps, and other fittings and equipment

specified in the Schedule hereto . . . . " . Sub-clauses (*b*) and (*c*) of Clause 1 imposed certain obligations upon plaintiff in respect of the said equipment. In my view there is nothing in Exhibit 'A' which could be construed as conferring upon plaintiff a right to occupy the premises; the agreement confers upon him a right to enter upon the premises to operate certain equipment upon the premises and nothing more. The other question for me to decide is whether the nature of the acts to be done by the plaintiff required that he should occupy the premises, despite the wording of the agreement. In my view they did not; it was not necessary for him to occupy the premises to operate the equipment.

For reasons which I have given I find that plaintiff was a licensee and not the tenant of the premises.

This finding disposes of the claim; plaintiff is not entitled to an order for possession because I have found that he never was in possession and, for a similar reason, he is not entitled to damages for unlawful ejectment.

I think, however, I should refer to another matter raised during the hearing. Clause 8 of the agreement, Exhibit 'A', gives either party the right to terminate the agreement by giving the other one month's notice in writing. Plaintiff admitted receiving a letter dated 24th December, 1956, from 1st defendant, Exhibit 'B', which purports to be a notice terminating an agreement dated 10th March, 1955. For 1st defendant it was stated that this reference to the agreement of 10th March, 1955, was a mistake; that the company were not aware that a second agreement had been entered with plaintiff. Under the agreement of 10th March, 1955, plaintiff had been a licensee to operate Petrol Filling Station equipment at Beach Road; later, and before 24th December, 1956, the Station at Beach Road had been closed and transferred to Queen Elizabeth's Way; plaintiff had continued as licensee at Beach Road until the Station closed and was the licensee at Queen Elizabeth's Way when the Station opened there until the time he received Exhibit 'B'. In my view, therefore, he could have been in no doubt whatsoever when he received Exhibit 'B' that Exhibit 'B' was notice to terminate the agreement under which he was permitted as licensee to operate Petrol Filling Station equipment at Queen Elizabeth's Way. Thus even if he had claimed damages for breach of that agreement, on the grounds that it had been terminated without notice, I would have dismissed the claim.

For reasons which I have given the claim is dismissed.

Judgment for the defendants.

LAMIDI AKANBI *v.* COMMISSIONER OF POLICE

[C.A. (Hurley Ag. C.J. and Reed J.) September 24, 1957]

[Jos Criminal Appeal No. JD/38CA/1957]

Appeal against an order disqualifying appellant from holding a driving licence—circumstances in which such an order is appropriate.

The appellant pleaded guilty to the following six charges under the Road Traffic Ordinance; the Motor Vehicles (Third Party Insurance) Ordinance; and the Road Traffic Regulations:—

(*i*) refusing to give his name and address, section 24 (1) of the Ordinance;

(*ii*) failing to produce his driving licence, Regulation 36 (1) (*b*);

(*iii*) failing to produce his certificate of insurance, section 17 (1) of Cap. 139;

(*iv*) carrying passengers in excess of the number authorised, Regulation 44 (*a*);

(*v*) permitting a passenger to ride on the canopy of the vehicle, Regulation 36 (1) (*r*);

(*vi*) failing to provide secure seating for passengers, Regulation 63 (3).

He was sentenced to pay a fine of £5, or to serve one month's imprisonment in default, on each charge; and he was disqualified from holding a driving licence for two years. He appealed against an order of disqualification.

Held: Suspension or disqualification are appropriate only when the person convicted has shown himself to be unfit to be in charge of a motor vehicle.

CRIMINAL APPEAL

Eso for the appellant;

Bello, Crown Counsel, for the respondent.

Reed, J. (delivering the judgment of the Court): This is an appeal against sentence only, and only insofar as the sentence ordered disqualification from holding a driving licence. In our view the appeal should be allowed. Suspension or disqualification are appropriate only where the person convicted has shown himself to be unfit to be in charge

Akanbi v. C. of P.

Hurley, Ag. C.J.

of a motor vehicle. Examples of such unfitness are speeding, dangerous driving, intoxication while in charge of a vehicle, dangerous overloading in the case of a professional driver. It cannot be said that any of the offences of which appellant was convicted in this case show him unfit to have charge of a vehicle; and he was a first offender. The appeal is allowed in that the order disqualifying the appellant from driving is revoked.

Appeal allowed.

DADDO *v* BAUCHI NATIVE AUTHORITY

[C.A. (Brown C.J. and Reed J.) March 22, 1958]

(Assessors: M. Salawu, Senior Alkali of Ilorin, M. Umaru Ibrahim, Chief Alkali of Kaduna.)

[Jos—Criminal Appeal No. JD/2CA/1958]

Appeal from the decision of the Moslem Court of Appeal dismissing an appeal against a conviction for homicide—Confession of intention to beat—Necessity for kasama oaths dependent on nature of wounds inflicted.

The appellant, one Keke, and one Rabo were coming home from market and the deceased overtook them. They stepped aside to let him pass. Instead of proceeding on his way, the deceased attacked Keke and the appellant with a stick. The fight came to a stop and deceased left, but later came back accompanied by his younger brother Kase. A further fight ensued, Kase attacked Keke and the deceased attacked the appellant. At the trial the appellant said the deceased struck him four times but he did not know how many times he struck the deceased.

The only evidence before the court was the confession of the appellant to his intention to beat but not to kill the deceased.

Held:

(1) If a person intends to beat another and that other person dies as a result of the beating it is homicide in Maliki Law.

(2) If there is a confession to the intention to beat it is a confession to intentional homicide if the victim dies.

(3) In this case the wounds were such as would in the ordinary course of nature cause death; the offence of intentional homicide was proved by the confession, and no *kasama* oaths were required. But when the wounds are of such a nature that death would not ordinarily be caused, a confession to an intention to beat is not enough and the *kasama* oaths would be necessary to complete the proof.

CRIMINAL APPEAL FROM MOSLEM COURT OF APPEAL

Kayode Eso for the appellant;

Alcock, Crown Counsel, for the respondent.

Brown, C.J. (delivering the judgement of the court): The appellant killed Kisabo. Keke, the younger brother of the appellant, had taken the wife of one of the deceased's sons.

The facts were that the appellant, Keke, and Rabo were coming home from market and the deceased overtook them. They stepped aside to let him pass. But instead of proceeding on his way the deceased attacked Keke and the appellant with a stick. This fight came to a stop, and the deceased left them. But he came back, accompanied—according to Rabo and the appellant—by the deceased's younger brother Kase. A further fight ensued, in which according to Rabo and the appellant—Kase attacked Keke and the deceased attacked the appellant. Rabo's evidence was rejected by the trial court on the ground of his relationship. In reply to the question of how many times he struck the deceased, the appellant replied that the deceased struck him (the appellant) four times, but he did not know how many times he (the appellant) struck the deceased. Five wounds were found on the body, and the medical evidence was that the beating "broke his brain". The defence throughout was that the appellant intended to beat the deceased but did not intend to kill him.

The first ground of appeal was that the appellant did not confess to intentional homicide but to accidental homicide. We are advised by our Assessors that if a person intends to beat another, and that other person dies as a result of the beating it is homicide in Maliki Law. We are also advised that if there is a confession to the intention to beat, it is a confession to intentional homicide if the victim dies. Our Assessors agree with the quotation from Vol. 2 of Mayyare which was referred to by the Moslem Court of Appeal.

This case then was proved according to the requirements of Maliki Law by the appellant's confession; and no *kasama* oaths were required. But we are advised that not in every case where there is a confession that the accused intended to beat though not to kill could *kasama* oaths be dispensed with. It depends upon the nature of the wounds inflicted. If the wounds are such that in the ordinary course of nature they must cause death, as in this case where the brain was 'broken', no *kasama* oaths would be necessary. But if the wounds are of such a nature that death would not ordinarily be caused, as for example where the victim is cut with a sword on his leg and death ensues, then the *kasama* oaths would be required.

(The learned Chief Justice then proceeded to deal with the question of manslaughter.)

Conviction for homicide maintained; sentence of death set aside and ten years' imprisonment substituted.

EZEBUIRO *v* COMMISSIONER OF POLICE

[C.A. (Brown C.J. and Bate J.) April 17, 1958]

[Kaduna—Criminal Appeal No. Z/2A/1758]

Section 99 *of the Criminal Code—Meaning of "for the performance of his duty"—Meaning of "by virtue of his employment" in section* 390 (5) *contrasted with section* 98.

The appellant, who was employed in the Posts and Telegraphs Department, was convicted upon two charges; firstly, of accepting a reward beyond his proper pay and emoluments for the performance of his duty, contrary to section 99 of the Criminal Code; secondly, of stealing the sum of £2 which came into his possession by virtue of his employment, contrary to section 390 (5). It was part of the appellant's duty to allocate radio distribution sets to customers, for which there was a waiting list. The magistrate found that he asked for, and accepted, a sum of 25 shillings for allocating a set out of turn. He also found that the same customer handed to him a further sum of 15 shillings as advance payment on the set.

Held:

(1) the sum of 25 shillings which he accepted for allocating the set was not accepted "for the performance of his duty", because it was not his duty improperly to allocate a set out of turn.

(2) the sum of 25 shillings which he accepted for improper allocating the set was the property of his employers, as was the 15 shillings which was paid as advance payment on the set; and both sums "came into his possession by virtue of his employment".

Cases Referred to:

Biobaku v Police, XX N.L.R. 30, applied;

Reading v Attorney-General, (1951) 1 A.E.R. 617, applied

Attorney-General v Goddard, (1929) 98 L.J.K.B. 743, applied;

Nzegwu v Police, XX N.L.R. 163, distinguished.

CRIMINAL APPEAL

Appellant in person;

Eso for the respondent.

Bate J. (delivering the judgment of the Court): The appellant was convicted upon charges of official extortion and of stealing by persons in the public service under sections

99 and 390 (5) of the Criminal Code respectively. He appeals against conviction.

It was proved at the trial that the appellant was employed in the Posts and Telegraphs Department in connection with the radio diffusion service; and the learned Magistrate found that he asked for and accepted a sum of 25 shillings for allocating a radio diffusion set out of turn and before a set would in the ordinary course have been allocated. He also found that a sum of 15 shillings was paid to him as advance payment on the set, which sum was the property of his Department.

The appellant appeared in person. We find that there is no substance in the grounds of appeal which he has filed. But Mr Eso, who appeared for the Crown, very properly drew attention to an unsatisfactory aspect of the conviction under section 99. The charge under this section alleges that the appellant accepted £2 beyond his proper pay and emoluments for the performance of his duty as a public officer. But it was no part of his official duties to allocate a radio diffusion set to a person out of turn, for which he accepted the sum of 25 shillings. Consequently the conviction upon the first charge cannot be supported having regard to the evidence. With this we agree and are of opinion that the conviction upon the first charge must be quashed.

Mr Eso suggested that the charge might more appropriately have been laid under section 98 (1), but submitted that a conviction under that provision could not properly be substituted for a conviction under section 99. It is an essential element of the offence created by section 98 (1) that the accused acted corruptly. This is not so in relation to an offence against section 99. Proceedings under section 99 do not raise the issue of corruption at all. The suggestion was made in *Biobaku v Police*, XX N.L.R. 30, that a conviction under section 98 (1) might be replaced by a conviction under section 99, but the suggestion was not accepted. We share the doubt expressed in that case with regard to the interchangeability of section 98 and section 99 and decline to substitute a conviction under section 98. This is not of course to say that a charge under section 98 would necessarily have failed.

The difficulty, in cases of corruption and extortion, of framing the charge under the correct provision of the Code has been the subject of comment in the courts of Nigeria on previous occasions, notably in *Biobaku's* case. We hope that before proceedings are undertaken in relation to offences

Ezebuiro v C. of P. Brown, C.J.

of this nature the advice of the Law Officers will be sought whenever possible.

Mr Eso has also suggested that the conviction of stealing £2 under section 390 (5) should not be allowed to stand because it cannot properly be said that it was "by virtue of his employment" that the money came into the appellant's possession. It is said that the employment had nothing to do with the acceptance of money dishonestly obtained.

This argument can only be made to apply to the sum of 25 shillings which he accepted for improperly allocating the set out of turn. It cannot apply to the 15 shillings which was paid as advance payment. This sum of 15 shillings was clearly the property of his employers, and came into his possession by virtue of his employment. Therefore the only question, upon the second charge, is whether the appellant was properly convicted of stealing the full amount of £2, which was made up of the 25 shillings and the 15 shillings, or whether he should only have been convicted of stealing the 15 shillings which was handed to him as advance payment.

Reading v Attorney-General, (1951) 1 A.E.R. 617, to which the learned Magistrate refers in his judgment, seems to be clear authority for saying that the 25 shillings, which the appellant improperly accepted for allocating the set, was the property of his employers. It remains to consider whether this sum "came into his possession by virtue of his employment" as the section requires.

The Shorter Oxford English Dictionary gives the phrase "by virtue of" the following meanings—"by the power or efficacy of; hence, in later use, by the authority of, in reliance upon, in consequence of, because of". There is nothing in these meanings to exclude the view that money may come into a man's possession by virtue of his employment even though it is obtained dishonestly.

Our attention has not been drawn to any decision in which the expression "by virtue of his employment" in section 390 (5) has been judicially interpreted. The facts in *Reading's* case were that Sergeant Reading, while a serving soldier, received large sums of money for conducting civilian lorries to a destination which they might not have reached if it had not been for the presence of a British N.C.O. in uniform. The Crown successfully claimed the money. The House of Lords dismissed Reading's appeal. The headnote to the report of the proceedings in the House of Lords includes the phrase "Profits obtained by servant dishonestly by virtue

of employment". Lord Porter said in the course of his opinion:—

> "It is often convenient to speak of money obtained as received in the course of the servant's employment, but, strictly speaking, I do not think that expression accurately describes the position where a servant receives money by reason of his employment, but in dereliction of his duty. In *Attorney-General v Goddard*, (1929) 98 L.J.K.B. 743, the bribes given to Police Sergeant Goddard were received by reason of his employment, but not in the course of his employment, except in the sense that his employment afforded the opportunity by which the gain was made".

The appellant and Sergeant Reading appear to have been in much the same position. Both were employed in the public service; each dishonestly sold for money the advantages which his employment gave him. Neither would have had those advantages to sell if it had not been for his employment. Each was in the position described by Lord Porter of a servant who receives money by reason of his employment but in dereliction of his duty. We think that the expressions "by virtue of", "because of", and "by reason of" all have the same meaning. If this is correct, the passage quoted from Lord Porter's opinion appears to be high authority for the proposition that money may come into a man's possession by virtue of his employment even though it is obtained dishonestly.

There might however be quoted in opposition to this view the decision of the former Supreme Court of Nigeria in *Nzegwu v Police*, XX N.L.R. 163. The appellant in that case had been charged under section 98 (1) that he, being employed in the public service, to wit, Registrar of Marriages, by virtue of such employment corruptly asked from S.M. a sum of 15 shillings on account of filing a notice of marriage in the Registrar's Office. The appeal was allowed on the ground that the charge disclosed no offence; the expression "by virtue of such employment" in section 98 (1) does not qualify the word "ask" but relates to the "duty" which, by virtue of his employment, he is charged to perform. This in itself is immaterial to the question under consideration in the appeal now before us. But there occurs in the judgment in *Nzegwu's* case the following passage:—

> "What the charge does set out is that the accused was employed in the public service as Registrar of Marriages and that by virtue of such employment he

Ezebuiro v. C. of P.

Brown, C. J.

asked for money on account of filing a notice of marriage. This is not only incorrect but absurd because it was not by virtue of his employment that the accused asked for money (as is alleged)".

We agree that it is absurd to charge a man that he, by virtue of his employment, corruptly asked for money; but we do not think that this precludes the possibility that money may come into a man's possession by virtue of his employment even though dishonestly obtained. His employment may provide the reason for the money coming into his possession, but not the reason why he asked for the money.

We think that the appellant, Ezebuiro, was able to obtain the 25 shillings for which (with the 15 shillings which he received as advance payment) he was convicted of stealing because he was a clerk in the radio-diffusion section of the Posts and Telegraphs Department; this is tantamount to saying that the money came into his possession by virtue of, or by reason of, or because of, his employment. The fact that he obtained the money in dereliction of his duty is immaterial. The appeal against conviction on the second charge is therefore dismissed.

The conviction and sentence upon the first charge are set aside. The conviction and sentence of twelve months imprisonment with hard labour upon the second charge are maintained; and the appellant is remanded in custody to serve his sentence.

Appeal dismissed.

B. M. OKOLIE *v* UKE IBO

[C. A. (Hurley S.P.J. and Reed J.) April 17, 1958]

[Jos—Appeal No. JD/21CA/1958]

Jurisdiction of High Court in appeal from Moslem Court of first instance—section 62 (2) *of Native Courts Law*, 1956.

In this appeal to the High Court from a judgment of the Senior Alkali of Jos a preliminary question was raised of whether the High Court had jurisdiction to hear the appeal or whether the appeal lay, in the first instance, to the Moslem Court of Appeal by virtue of section 62 (1) (*a*) (*i*) of the Native Courts Law, 1956. The parties were Ibos, and the dispute concerned the supply of petrol.

Held: The race of the parties, their respective occupations, the nature of the transaction between them, and the commodity in which they dealt, raised a presumption that they intended their relations to be regulated by the principles of English law. The fact that the action had been brought in a Moslem court did not displace that presumption; and the High Court had jurisdiction to hear the appeal.

CIVIL APPEAL FROM A NATIVE COURT

Eso for the appellant;

Agbakoba for the respondent.

Hurley S.P.J. (delivering the Court's ruling on the preliminary point):

The parties to this appeal are Ibos residing in Jos. One of them is a transport owner; the other operates a petrol filling station. The dispute concerns the supply of petrol. The respondent brought an action against the appellant in the court of the Senior Alkali, Jos, and got a judgment against which appellant now appeals. There is a preliminary question of the jurisdiction of this court to hear the appeal. The Senior Alkali's court is a Grade A limited court. By section 62 (1) of the Native Courts Law the appeal from such a court lies to the Moslem Court of Appeal in cases governed by Moslem law and to this court in all other cases. By section 62 (2), which I quote in part, a case is deemed to be governed by Moslem law if it is a case to the determination of which it is lawful that the principles of Moslem law should be applied to the exclusion of the principles of any other system of law.

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Hurley, S.P.J.

By section 21 (5) of the Native Courts Law the Senior Alkali's court was entitled to apply to this case any principle of English law which the parties agreed, or intended, or might have been presumed to have agreed or intended, should regulate their obligations. If the Senior Alkali's court was entitled to apply any principle of English law then this case was not one to the determination of which it was lawful that Moslem law should be applied exclusively.

Now what presumption as to the intention of the parties appears from the record before us? We cannot suppose that they intended Moslem law to apply to the transaction between them. We do not think that the parties, having regard to their respective occupations and the nature of the transaction between them, and the commodity in which they dealt, intended that Ibo law and custom should apply. In the circumstances of this case the only presumption which it seems open to a court to make is that the parties intended that their relations should be regulated by the principles of English law. The fact that one of the parties chose to sue in the Senior Alkali's court does nothing, in our opinion, to disprove that presumption, for, by section 21 (5), that court itself was competent to apply English law.

For these reasons we consider that we have jurisdiction in this appeal.

REGINA *v* MALLAM MAINA WAZIRI

[High Court (Reed J.) April 14, 1958]

[Maiduguri—Trial upon Information—No. JD/99C/1957]

Charge upon information for a non-indictable offence—section 340 *Criminal Procedure Ordinance—meaning of the words "which may lawfully be joined in the same information" in proviso to subsection* (2)*—section* 158 *Criminal Procedure Ordinance.*

The accused was committed for trial before the High Court for manslaughter, which is an indictable offence. The information did not charge him with manslaughter but with a single count of dangerous driving, which is not an indictable offence.

Held: While in certain circumstances a count alleging a non-indictable offence may be joined in an information with a count or counts alleging indictable offences, a non-indictable offence alone is not triable upon information.

Case referred to:

Rex v Eze, XIX N.L.R. 110.

TRIAL UPON INFORMATION

Alcock, Crown Counsel, for the Crown;

Accused in person.

Reed, J.: The accused was committed for trial on a charge of manslaughter contrary to section 317 of the Criminal Code. Manslaughter is an indictable offence. The information charges accused with one offence only, namely dangerous driving contrary to section 18 (1) of the Road Traffic Ordinance. This is not an indictable offence; see the definition of "indictable offence" in section 2 of the Criminal Procedure Ordinance and *R. v Eze*, XIX N.L.R. 110.

Section 340 (1) of the Criminal Procedure Ordinance states:—

> "Subject to the provisions of this section an information charging any person with an indictable offence may be preferred by any person before the High Court charging any person with an indictable offence for which that person may lawfully be indicted . . . . "

The first proviso to subsection (2) of section 340 states that:—

> "Where the person charged has been committed for trial, the information against him may include, either in

Regina v Waziri — Reed, J.

substitution for or in addition to the counts for charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a magistrate in his presence, being counts which may lawfully be joined in the same information".

I draw attention to the words of the proviso "which may lawfully be joined in the same information". Section 340 (1) lays down that the information must charge the accused person with an indictable offence and the first proviso to subsection (2) is subject to that requirement. Section 158 of the Criminal Produre Ordinance enables, in certain circumstances, a count alleging a non-indictable offence to be joined in an information but, in my view, there must be at least one count in the information charging an indictable offence in order to comply with section 340 (1).

I draw attention to section 333 (4) of the Criminal Procedure Ordinance. If, upon receipt of the depositions, a law officer is of opinion that the accused person should not have been committed for trial but that the case should have been dealt with summarily, he may refer the case back to the magistrate with a direction to deal with it summarily.

The information does not allege an indictable offence and, for reasons which I have given, the information is quashed.

Information quashed.

REGINA *v* JOSIAH ONYEAMAIZU

[High Court (Brown C. J.) April 3, 1958]

[Kaduna—Trial upon Information—KMD/21C/1958]

Homicide—Defence—Burden of Proof—Self defence—"Reasonable apprehension of death or grievous harm"—Whether grounds for apprehension "reasonable"—Provocation.

"The defence of self-defence is only available if there is a reasonable apprehension of death or grievous harm and if the person who claims to have exercised the right to kill his assailant had reasonable grounds for believing that the only way to protect himself from death or grievous harm was to kill his assailant. It is not open to an abnormally nervous or excitable person who, on being assailed by a comparatively minor assault, or an assault of any nature which falls short of that which is described in section 286 of the Criminal Code, unreasonably believes that he is in danger of death or grievous harm".

TRIAL UPON INFORMATION

The court found that about 7.15 p.m. on the evening of the 30th January, 1958, there was a struggle between the accused and the deceased at the former's house; that there was no other person present during the struggle; that in the course of that struggle the deceased, who was the stronger of the two, gripped the accused by the throat thereby causing minor abrasions with his finger nails. The court found as a fact that the act of the deceased in gripping the accused by the throat was not of such a nature as to cause reasonable apprehension to the accused of death or grievous harm. The court further found that at some stage during the course of the struggle, the accused picked up a knife and stabbed the deceased, causing a fatal wound.

Cases referred to:

R. v Smith, (1837) 8 C. and P. 160, *direction of Bosanquet, J. doubted;*

R. v Lobell, (1957) 1 Q.B. 547; (1957) 2 W.L.R. 525; (1957) 1 A.E.R. 734. 41 Cr. App. R. 100 *applied.*

[*Editorial Note.* If during a quarrel between two persons on equal terms, one takes up a deadly weapon and kills the other, this would appear to be manslaughter only, *R. v Snow*, 1 Leach 151; 1 East P.C. 244; *R. v Taylor*, 5 Burr. 2793. Cf. where use of deadly weapon was intended from the outset.

Regina v Onyeamaizu — Brown, C.J.

R. v Kessel, 1 C. and P. 437; *R. v Anderson*, (1816) 1 Russ on Crime (9th Ed.) 406. So far as the burden of proof is concerned, the direction of Bosanquet J. in *R. v Smith* (supra) while being an admirable direction on the law itself, places the burden of proving self-defence upon the accused himself, in defiance of the traditional English rule that the onus is never on the accused to establish any defence in a homicide case, apart from establishing insanity which is in reality not a defence at all. For the modern view on this matter see *Chan Kau v The Queen* (1955) A.C. 206; (1955) 2 W.L.R. 192; (1955) 1 A.E.R. 266 (P.C.); which was applied in *R. v Lobell* (supra). See also *R. v Prince* (1941) 3 A.E.R. 37, and *R. v McPherson* (1958) J.C.L. 106.]

Nasir, *Crown Counsel*, for the Crown;

Sawyer for the accused.

Brown C.J., having found the facts as set out above, continued: It is plain that in the light of judicial decisions over the past twenty years, of which *R. v Lobell*, (1957) 1 A.E.R. 734, is the most recent, the passage at the bottom of page 941 of the 33rd edition of Archbold relating to the old case of *R. v Smith*, 8 C. and P. 160, requires modification. Throughout this case the burden of proof remains on the prosecution to prove the charge of murder under section 316. By subsection (2) of that section, a person is guilty of murder if he intends to do to the person killed some grievous harm. The blow which the accused struck caused a wound 3 inches deep, which penetrated the heart. It must have been struck with the intention of causing grievous harm. But there are two defences, each of which must be considered separately; and if upon the whole of the evidence I am left in doubt whether this killing was done in self-defence, or under such provocation as would reduce the offence to manslaughter, the proper verdict will be not guilty in the one case or guilty of manslaughter in the other.

By section 286 a blow which is likely to cause death or grievous harm, as this blow was and did, can only be justified upon the ground of self-defence if the nature of the assault upon the accused was such as to cause him reasonable apprehension of death or grievous harm, *and*, I stress the word "and", if the accused believed, on reasonable grounds, that he could not have otherwise preserved himself from death or grievous harm. It is to be observed that the defence of self-defence is only available if there is *reasonable* apprehension of death or grievous harm and if the person who

claims to have exercised that right had *reasonable grounds for* believing that the only way to protect himself from death or grievous harm was to kill his assailant. It is not open to an abnormally nervous or excitable person who, on being assailed by a comparatively minor assault or an assault of any nature which falls short of that which is described in the section, *unreasonably* believes that he is in danger of death or grievous harm. Such a person may hope for clemency from other quarters; he cannot expect it from the law. It would be surprising, and indeed dangerous, if it were otherwise. The legal right to kill in self-defence cannot be made to depend upon the temperament, nervous or courageous, robust or weak, phlegmatic or excitable, of the individual killer. For those who claim to have exercised this legal right to kill, the law insists upon one standard: It is the standard of the reasonable man. From the evidence of the minor injuries to the accused's neck I have found as a fact that the act of the deccased in gripping the accused by the throat was not of such a nature as to cause reasonable apprehension to the accused of death or grievous harm. Therefore the defence of self-defence must fail.

By section 316 if a person kills another (*a*) in the heat of passion (*b*) caused by sudden provocation, (*c*) before there is time for his passion to cool, he is guilty of manslaughter only. Am I satisfied, upon the whole of the evidence, that this killing may not have been done in the three circumstances which the section lays down as reducing the offence to manslaughter? Whoever it was who started the struggle (as to which there is no sufficient evidence and I make no finding), I have found as a fact that in the course of the struggle the accused was gripped by the throat by a stronger man and that injuries were caused. It is impossible for me to be free from doubt that the act of the deceased in gripping the accused by the throat may have suddenly provoked the accused to the heat of passion. Nor can I be free from doubt, and it is a major doubt, that the accused may have picked up the knife while he was actually being held by the throat and struck the blow before there was time for his passion to cool. I therefore find the accused guilty of manslaughter.

Not guilty of Murder;
Guilty of Manslaughter.

ENE NSUDE *v* JAMES EDWIN ANIGBO

[C.A. (Smith Ag. S.P.J. and Reed J.)—March 25, 1958]

[Jos—Appeal No. JD/22A/1957]

Tort—Evidence disclosing a felony—Whether Magistrate should stay proceedings pending prosecution.

Judgment was given in favour of the plaintiff in the court below for the value of certain articles which he had given to the defendant for safe keeping and which the defendant refused to surrender. The defendant appealed. His counsel argued that since the plaintiff had alleged that the defendant had committed the felony of stealing by converting the articles to his own use, the magistrate should have stayed the proceedings until the defendant had been prosecuted for the felony.

Held: There was no duty upon the plaintiff to institute criminal proceedings against the defendant, since his claim was not based upon the felony.

Per Curiam: Even if the magistrate ought to have stayed the proceedings until the defendant had been prosecuted, it would not follow that the civil proceedings before him were a nullity.

Cases referred to:

Smith and wife v Selwyn, (1914) 3 K.B. 98 distinguished.

Midland Insurance Co. v Smith, (1881) 6 Q.B.D. 561 followed.

(*Editorial Note.*—It is clear that the general principles regarding this subject are to be found in the judgments in *Midland Insurance Company v Smith*. Three distinct types of case in which the question may arise must be kept in mind. (1) Where the claim is founded upon the felony then *Smith v Selwyn* applies. The rule does not apply where the claim is founded upon misdemeanour *Fissignton v Hutchinson* (1866) 15 L.T. 390. (2) Where it is possible that the facts upon which the claim is founded might support a charge of felony, but where the claim itself is not founded upon the felony. Such is this case *Nsude v Anigbo* and in such case the general principle does not apply. (3) Where an allegation of felony is raised by the defendant. In such a case the principle does not apply, for 'If such were the case it would always be open to a defendant to gain time by making the necessary allegation' *Odonkor v Allotey* 7 W.A.C.A. 160).

CIVIL APPEAL.

Nzude v. Amigbo

Smith, Ag. S.P.J.

Okwuosa for the appellant;

Dass for the respondent.

Reed J. (delivering the judgment of the court) stated the facts; and after considering the other ground of appeal, continued:

The second ground of appeal is an interesting one. It reads:-

"That the decision is erroneous in point of law in that since the evidence discloses a felony, there should either have been a prosecution for the felony or reasonable excuse given for the non-prosecution and therefore the learned magistrate erred in entering judgment for the plaintiff instead of staying the action."

The plaintiff's claim in the court below has already been stated. The defence to the claim was a denial that the articles in question were ever given to the defendant for safe-keeping. Mr Okwuosa submits that as the evidence alleged a felony, namely that the defendant had stolen the articles by converting them to his own use, the magistrate should have stayed the proceedings until the defendant had been prosecuted for that alleged felony. In support, he cited *Smith and wife v Selwyn*, (1914) 3 K.B. 98. In this case the statement of claim, on its face, alleged facts which, if true, constituted a felony, namely that the defendant had raped the female plaintiff, and the claim to damages was based upon that alleged felony. The defendant had not been prosecuted and no reasonable excuse shown for his not having been prosecuted. It was held that the proper course for the court to adopt was to stay further proceedings in the action until the defendant had been prosecuted. Kennedy L. J. said at page 103:

". . . . the court has a right, if not an imperative duty, to stay the proceedings in a civil action for damages, if it is clear that that which is the basis of the claim in the action is a felony committed by the defendant against the plaintiff."

Swinfen Eady L. J. stated at page 105:-

"It is well established that according to the law of England, where injuries are inflicted on an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prose-

Naude v Amigbo

Smith, Ag. S.P.J.

cuted or a reasonable excuse shown for his non-prosecution."

In our view the case before us is distinguishable from *Smith v Selwyn*. In the latter case, proceedings were stayed only because the felony was 'the basis' or 'the foundation', (to quote Kennedy L. J. and Swinfen Eady L. J. respectively) of the claim. Indeed the court gave the plaintiffs leave to amend the statement of claim within twenty-one days so that the trial could proceed; Kenndy L. J. stated at page 104:—

> "We ought, however, to give plaintiffs an opportunity of alleging, as the ground of the claim to damages, an assault on the female plaintiff which will amount to a misdemeanour only."

In the case before us the claim is based, as Mr Dass points out, upon the defendant's refusal to return certain articles. The principle of the common law which was applied in *Smith v Selwyn* was stated by Watkin Williams J. in *Midland Insurance Co. v Smith*, (1881) 6 Q.B.D. 561 at page 568 as follows:—

> ". . . . there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felony, but that there is a duty imposed upon the injured person, not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law."

In the case before us there was no duty upon the plaintiff to institute criminal proceedings against the defendant since his claim was not based upon a felony. The second ground of appeal fails.

We would add this. Even if the magistrate should have stayed the proceedings in the court below until the defendant was prosecuted it does not, in our view, follow that the proceedings were nullity as Mr Okwuosa contends. As was stated in *Midland Insurance Co. v Smith* (supra) the private injury is not merged in the public wrong. The civil right is not affected but, as a matter of public policy it, cannot be pursued until the wrongdoer has been prosecuted.

The appeal is dismissed with cost assessed at £7-7*s*-0*d*.

Appeal dismissed.

M. SALIHU *v* TIN AND ASSOCIATED MINERALS LIMITED AND OTHERS

[High Court (Reed J.) May 26, 1958]
[Jos—Civil Action—No. JD/14/1957]

Damages—Personal Injuries—Quantum of damages—Relationship of quantum awarded in England to quantum to be awarded in Nigeria.

In personal injuries cases perfect compensation is not possible; but compensation must be arrived at by careful consideration of all the heads of damage in respect of which the plaintiff is entitled to compensation and of his circumstances in life. In assessing the damages the following heads must be considered:—

(1) The bodily pain and suffering undergone and that which may occur in the future.

(2) The loss of earnings caused by the disability.

(3) The loss of amenities of life caused by the disability.

(4) The age and expectation of life of the plaintiff.

Cases considered:

Bird v Cocking and Sons Limited (1951) 2 T.L.R. 1260; 1952 W.N.5 (C.A.)

Watts v Harrison (1951) (unreported but to be found at p. 333 Bingham on Motor Claims Cases, 3rd Edition.)

Conway v George Wimpey and Company (1950) 2 A.E.R. 331.

Lee v Lord Mayor, etc. of Manchester and *Bradley v Richard Thomas and Baldwin Limited* (unreported but to be found at pp. 287 and 286 respectively of Kemp and Kemp on *Quantum of damages in Personal Injury Claims*, 1st Edition.)

Mulready v. Bell (1953) 2 Q.B. 117; (1953) 3 W.L.R. 100; (1953) 2 A.E.R. 215.

Croston v Vaughan (1938) 1 K.B. 540.

CIVIL ACTION

The plaintiff was injured as a result of the negligence of the defendants. As a result of that negligence his left leg was amputated approximately seven inches below the knee joint.

Eso, for the plaintiff;

Bentley, for the 1st and 2nd defendants;

Agbakoba, for 3rd defendant.

Salihu
v.
Tin and others
Reed, J.

Reed, J.: having dealt with the question of liability, continued:—

I now deal with damages. As a result of the negligence of the defendants, the plaintiff has had his left leg amputated approximately seven inches below the knee-joint. He claims £2,000 general damages. No special damages are claimed.

Birkett L. J. said in *Bird v Cocking and Sons Limited* (1951) 2 T.L.R.1260:—

> "The assessment of damages in cases of personal injuries is, perhaps, one of the most difficult tasks which a judge has to perform . . . . The task is so difficult because the elements which must be considered in forming the assessment in any given case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements. Although there is no fixed and unalterable standard, the courts have been making these assessments over many years, and I think that they do form some guide to the kind of figure which is appropriate to the facts of any particular case . . . . ."

That was said by a judge in England where there are many reported cases and it is possible to ascertain approximately what damages are awarded in comparable cases. In Nigeria the task of the judge is even more difficult because I am not aware of a single reported case upon the assessment of damages in cases of personal injury. English cases can act as a rough guide only, because standards and conditions of living are so utterly different in each of the two countries.

Perfect compensation is not possible; but compensation must be arrived at by careful consideration of all the heads of damage in respect of which the plaintiff is entitled to compensation and of his circumstances in life. In assessing the damages the following heads must be considered:—

1. The bodily pain and suffering undergone and that which may occur in the future.
2. The loss of earnings caused by the disability.
3. The loss of amenities of life caused by the disability
4. The age and expectation of life of the plaintiff.

I shall deal with each of these heads in turn. First the bodily pain and suffering undergone and that which may occur in the future. The plaintiff was struck by a motor vehicle and his leg was crushed and almost torn from his body. He was admitted to hospital and the leg was amputated.

immediately. He was in bed for about two weeks and was in hospital from 11th April to 2nd June, 1956. Thereafter he was an outpatient for eight weeks. He complains of pain in his leg now, but the doctor stated that this could be cured by a minor operation. Secondly the loss of earnings caused by the disability. The plaintiff is a farmer. He told the court that he fed his wife and six children upon the produce of the farm and his net profit from the sale of farm produce was £40 to £50 per annum. I accept this evidence and find that his earnings as a farmer were approximately £100 per annum. Thirdly the loss of amenities of life caused by the disability. There is, of course, no evidence on this issue, but it is obvious that a person who has lost a leg cannot enjoy the pleasures and amenities of life as he could hitherto. Fourthly the plaintiff's age and expectation of life. He is approximately 40 years of age. His expectation of life has not been affected by the accident.

Next I propose to look at English cases to see approximately what damages were awarded in comparable cases. Some of these cases are not reported but the facts are given in the textbooks referred to. Counsel for the first and second defendants referred me to two cases cited in *Bingham on Motor Claims Cases*, third edition. In *Watts v Harrison*, (1951) £2,225 general damages were awarded to a male agricultural trainee aged twenty-six years who lost his right leg 8 inches below the knee. He would have become an agricultural worker. With an artificial leg he could do most types of work and some kinds of outdoor work in agriculture. In *Conway v George Wimpey and Company* (1950) a jury awarded a contractor's labourer who had had his right leg amputated a few inches below the knee £2,000 general damages.

Counsel for the plaintiff referred me to three English cases cited in *Kemp and Kemp* on *The Quantum of Damages in Personal Injury Claims* but I do not think they were as helpful as the cases cited by counsel for the first and second defendants. In *Lee v Lord Mayor, etc. of Manchester* (1953) £4,000 general damages were awarded to a girl of five years who lost a leg below the knee.

In Mulready v Bell (1953) a workman was awarded £5,600 general damages for "grievous injury including the loss of a leg". But the report does not say whether the amputation of his leg was above or below the knee. In *Bradley v Richard Thomas and Baldwin Limited* (1952) the plaintiff

Salihu
v.
Tin and others
Reed. J.

lost a leg at mid-thigh level and had some damage to the other leg; he was awarded £5,500 general damages.

In my view the cases which provide the best guide are *Watts'* and *Conway's* cases. Each were damages awarded to an adult male who had lost a leg below the knee. The retention of the knee joint and 7 inches of the leg below that joint does, of course, make a difference. The doctor who treated the plaintiff told the court that an artificial leg could be fitted. I take the view that in a case in England comparable to the one now before me damages of £2,000 to £2,500 would be awarded.

I have already said that English cases can serve only as a rough guide since standards and conditions of life vary so greatly. Particularly do these observations apply to earning capacity. The plaintiff's earning capacity as a farmer is about £100 a year and a person in England in a comparable positon to him would have an earning capacity at least five times as great as that. Let me put it in another way; £x would purchase for the plaintiff far more of the necessities and amenities in life to which he is accustomed than £x would purchase for a person in a comparable position in England. Another point is that the expectation of life is not so high in Nigeria as it is in England: a man of forty in Nigeria is "older" than a man of forty in England. But, on the other hand, the loss of a leg in Nigeria is more serious than in England since a person in the plaintiff's position relies to a much greater extent on his legs for transport than would a person in a comparable position in England.

Taking all these matters into consideration I think a fair way of assessing the damages is to allow the plaintiff approximately one-third of the damages which a court in England would have awarded in a comparable case. I assess the damages at £750.

Judgment is entered for the plaintiff against the first, second and third defendants jointly and severally for £750.

Judgment for the plaintiff for £750 with costs.

SALAMETU OYENE *v* SALIHU ABOGU

[C.A. (Hurley, S.P.J., McCarthy, Ag. J.) May 27, 1958]

[Lokoja—Case stated—No. JD/14A/57]

Jurisdiction of magistrate—Suit for declaration of title to land—Land held under certificate of occupancy—Section 21 *Land and Native Rights Ordinance, Cap.* 105—*Sections* 18 (1) (*d*) *and* 18 (3) *Magistrates' Courts (Northern Region) Law*, 1955.

Where there is no native court of competent jurisdiction in a particular area, the jurisdiction conferred upon a magistrate in land cases is that conferred upon him by section 21 Land and Native Rights Ordinance.

Unlike the High Court, a magistrate has no jurisdiction to try an action for a declaration of title of ownership to land.

Per curiam: Section 21 of the Ordinance confers jurisdiction wherever it has been thought necessary that it should confer it in order to make the various courts competent to entertain the proceedings which are to be prosecuted in them. The section is not to be taken as enlarging the jurisdiction of any court where an enlargement is not required to satisfy the purpose of the section.

Cases referred to:

Igiokwe v Nanna, XVII N.L.R. 5 followed;

Toriola v Arewa, 12 W.A.C.A. 505 followed;

R. v Cheshire County Court Judge and the United Society of Boilermakers, Ex parte Malone, (1921) 2 K.B. 694 applied;

De Vries v Smallridge, (1928) 1 K.B. 482 applied.

CASE STATED

The facts of this case and the question reserved by the Magistrate, Ilorin, for the consideration of the High Court appear sufficiently from the judgment.

Onagoruwa for the plaintiff;

Fajemisin for the defendant.

Hurley, S.P.J., in a written judgment which was read by McCarthy, Ag. J., said:—

In this case stated under section 110 of the Magistrates' Courts (Northern Region) Law, 1955, the Magistrate Grade I,

Oyene v Abogu

Hurley, S.P.J.

Ilorin, asks for the opinion of this court on the following question:—

> "Is a magistrate empowered by virtue of section 21 of the Land and Native Rights Ordinance as amended or by any other enactment to entertain a suit for a declaration of title in respect of land held under rights of occupancy?"

The following are the facts as set out in the case stated: The action before the magistrate is between one Salametu Oyene as plaintiff and one Salihu Abogun as defendant. The claim is for a declaration of title of ownership of a piece of land at Idoji Quarters, Okene, and for £150 damages for completely demolishing a house on the land and thereby forcibly ejecting the plaintiff's relations who were living in it. The claim for a declaration is laid as a substantive claim, and not as one merely ancillary to the claim for damages. The plaintiff alleges that by virtue of native law and custom he inherited the land and the house from his late brother who built the house some years ago. The land is held under a customary right of occupancy and is worth less than £200. It does not appear from the case stated whether or not both parties to the action are persons subject to the jurisdiction of a native court; but we presume from their names and from the facts of the case that they are. Okene is in the Igbirra Division of Kabba Province, and it appears from section 21 (6) of the Land and Native Rights Ordinance, Cap. 105, section 19 (4) of the Native Courts Law, 1956, and paragraph 3 and the First Schedule of the Native Courts (Jurisdiction and Powers) Notice, 1957 (Legal Notice No. 208 of 1957) that in Igbirra Division there is no native court of competent jurisdiction for the trial of proceedings under section 21 of the Ordinance or for the trial of land cases. The magistrate's jurisdiction to entertain the claim for damages is not in question. Having regard to the facts as stated and all the circumstances, the question on which we are to give our opinion comes to this: "Is a Magistrate Grade I empowered by virtue of section 21 of the Land and Native Rights Ordinance as amended or by any other enactment to entertain a suit for a declaration of title of ownership of land under £200 in value held under a customary right of occupancy where the parties to the suit are persons subject to the jurisdiction of a native court and there is no native court of competent jurisdiction in the area where the land is situated?"

By sub-sections 1 (*d*) and (3) of section 18 of the Magistrates' Courts (Northern Region) Law a magistrate of the

first grade has jurisdiction in all classes of proceedings in respect of which jurisdiction has been conferred upon a magistrate's court by the Land and Native Rights Ordinance and in which the subject-matter in dispute, if capable of estimation at a money value, does not exeed two hundred pounds in amount or value. Jurisdiction is conferred on magistrates' courts in section 21 of the Land and Native Rights Ordinance by sub-sections (2) and (4) in the classes of proceedings respectively described in those sub-sections. Sub-section (4) is not in point in this case, because it applies only where one or more of the parties is not subject to the jurisdiction of a native court. Sub-section (2) gives jurisdiction in all claims, irrespective of who the parties are, arising under the provisions of the Ordinance in respect of rights under a right of occupancy; but this is subject to sub-section (3), which directs that suits between persons subject to the jurisdiction of a native court in respect of rights arising under a statutory right of occupancy granted by a native authority or under a customary right of occupancy shall be prosecuted before a native court of competent jurisdiction, which is defined in sub-section (6). If there is no native court of competent jurisdiction in a particular area, however, the provisions of sub-section (2) are to apply in the area instead of the provisions of sub-section (3). That is the case here, and the magistrate's jurisdiction under the Land and Native Rights Ordinance is that conferred on a magistrate's court by section 21 (2).

Unless it is to be found in the Land and Native Rights Ordinance, there is no jurisdiction in a magistrate's court to try an action for a declaration of title of ownership of land. That appears from the decision in *Toriola v Arewa*, 18 W.A.C.A. 505 at page 508, approving *Igiokwe v Nanna*, 17 N.L.R. 5, upon the construction of section 19 (1) of the Magistrates' Courts Ordinance, Cap. 122, which is the same as section 18 (1) of the Magistrates' Courts (Northern Region) Law without paragraphs (*c*) and (*d*) and with the proviso removed and re-enacted in the next sub-section. Section 31 (2) of the Magistrates' Courts Law, it is true, gives magistrates wide powers of granting relief, and is expressed in such ample terms as apparently to include power to grant declarations. But this sub-section was in force as sub-section (2) of section 32 of the Magistrates' Courts Ordinance when *Toriola v Arewa* was decided. The relief which may be granted under the sub-section, like the relief which might have been granted in a County Court under section 89 of the Judicature Act, 1873,

Oyene v. Abogu — Hurley, S.P.J

is ancillary relief in a claim otherwise within the substantive jurisdiction of the court: *R. v Cheshire County Court Judge and United Society of Boilermakers, Ex parte Malone*, (1921) 2 K.B. 694; *De Vries v Smallridge*, (1928) 1 K.B. 482. The High Court, unlike the magistrates' courts, has, under sections 11 and 12 of the Northern Region High Court Law, 1955, a jurisdiction which includes jurisdiction in title actions. The purpose of section 21 of the Land and Native Rights Ordinance is to regulate the choice of courts for certain proceedings in respect of statutory rights of occupancy (sub-section (1)), proceedings in respect of rights acquired (sub-section (2)) or arising (sub-section (3)) under rights of occupancy, suits in respect of land the subject of certain rights of occupancy (sub-section (4)), and proceedings for the recovery of rent payable under the Ordinance (sub-section (5)). The section confers jurisdiction wherever it has been thought necessary that it should confer it in order to make the various courts competent to entertain the proceedings which are to be prosecuted in them. It is not to be taken as enlarging any jurisdiction where an enlargement is not required to satisfy its purposes. Sub-sections (2) and (4) direct that certain proceedings should be taken in a magistrate's court, but only alternatively with the High Court. Because recourse can be had alternatively to the High Court, where these two sub-sections confer jurisdiction on a magistrate's court they are not to be taken as conferring any jurisdiction which the magistrate's court does not otherwise possess and which the High Court otherwise does possess. Thus where there are proceedings of a kind described in one of the sub-sections relating to a subject-matter of more than five hundred pounds in value, the sub-section, though it directs them to be taken in the High Court or a magistrate's court and gives those courts jurisdiction in that behalf, does not enlarge the jurisdiction of magistrates' courts as prescribed in section 18 of the Magistrates' Courts Law, where the widest jurisdiction, that of a Chief Magistrate, is limited to five hundred pounds; and the proceedings must go to the High Court. Similarly, if the proceedings are a suit where the substantive relief sought is a declaration of title, no enlargement of the jurisdiction of magistrates' courts is to be implied, and the proceedings can only be taken in the High Court.

Moreover, sub-section (2) of section 21, which as we have said, gives the magistrate jurisdiction under the Land and Native Rights Ordinance, where, as in this case, there is no native court of competent jurisdiction, does not relate to cases where a declaration of title is claimed. It deals with

"claims. . . arising under the provisions of this Ordinance in respect of any rights under a right of occupancy". A right of occupancy is not a right in any general sense; it is a title. As defined in section 2 of the Ordinance, it is a title to the use and occupation of land. Under such a title, rights to use and occupy land, and connected and ancillary rights, are acquired. The proceedings mentioned in sub-section (2) are claims in respect of rights acquired under the right of occupancy or title, not claims in respect of the right of occupancy or title itself. They are not proceedings in which title is claimed, or, in other words, in which a declaration of title is sought.

For the foregoing reasons we are of opinion that the magistrate is not empowered to entertain this suit between persons subject to the jurisdiction of a native court for a declaration of title of ownership of land held under a customary right of occupancy in an area where there is no native court of competent jurisdiction, and that the answer to the question raised on the case stated is No.

It may not be amiss to add some general observations on the provisions of section 21 of the Land and Native Rights Ordinance, which are complex. The section is to be read with the enactments which confer jurisdiction on the High Court, native courts, and magistrates' courts, and with reference particularly to their land jurisdiction. By sections 11 and 12 of the Northern Region High Court Law, the High Court is a superior court of record with all the jurisdiction of the High Court of Justice in England and universal jurisdiction in all classes of actions. By section 16 (1) (*a*) this jurisdiction may not be exercised at first instance in cases which raise any issue as to the title to land or as to the title to any interest in land which is subject to the jurisdiction of a native court, and this of course includes cases where the claim is for a declaration of title to land subject to the jurisdiction of a native court. Section 16 (1) (*a*) is subject to the provisions of the Land and Native Rights Ordinance, so that the bar which it imposes on the exercise of the High Court's jurisdiction is removed where the Ordinance provides that jurisdiction should be exercisable by the High Court. The land jurisdiction of native courts is conferred under sections 17 and 18 of the Native Courts Law, 1956, subject to the limitations by grade set out in the First Schedule to the Law. Courts of Grade A Unlimited have unlimited jurisdiction in causes and matters concerning the ownership, possession, or occupancy of land; courts of other grades have the like jurisdiction, limited as set out in the Schedule, but only

Oyene v Abogu

Hurley, S.P.J

where they are courts of competent jurisdiction for the trial of land causes as such courts are defined in section 19 (4) of the law. Where there is no native court of competent jurisdiction, then under section 19 (3) land causes are to be taken in the High Court or a magistrate's court. Section 19 (3) does not confer any jurisdiction on the High Court or magistrates' courts. The jurisdiction of magistrates' courts is set out in section 18 (1) of the Magistrates' Courts (Northern Region) Law; apart from jurisdiction in the proceedings mentioned in paragraph (*d*), proceedings, that is, in which jurisdiction is conferred by the Land and Native Rights Ordinance, there is no jurisdiction in cases relating to land unless they are personal suits for damages within the meaning of paragraph (*a*), or suits between landlord and tenant for possession under paragraph (*b*), or suits for rates, expenses or the like recoverable by virtue of some written law within the meaning of paragraph (*c*). Paragraph (*f*), like section 31 (2), only gives jurisdiction to grant ancillary relief in suits otherwise within the competence of a magistrate's court. A magistrate's land jurisdiction, such as it is, may not be exercised where the suit raises any issue as to the title to land or to any interest in land: section 18 (2) (*a*) (*i*). This restriction, unlike the restriction on the High Court's exercise of its land jurisdiction, holds good whether the land is subject to the jurisdiction of a native court or not. Sub-section (2) (*a*) (*i*) of section 18 is subject to the provisions of sub-section (1) (*d*), that is to say, it is subject to the Land and Native Rights Ordinance, like section 16 (1) (*a*) of the High Court Law.

Section 21 (1) of the Land and Native Rights Ordinance provides that if the right of the Governor to grant a statutory right of occupancy is disputed proceedings may be taken in the High Court, which shall have and exercise jurisdiction in that behalf. Since a right of occupancy is a title, such proceedings will necessarily be proceedings where title is in question, and they do not lie in a magistrate's court. Express provision is made enabling the High Court to exercise jurisdiction because otherwise in any case where the land the subject-matter of the right of occupancy was subject to the jurisdiction of a native court the High Court's exercise of its jurisdiction would be barred. Section 21 (2) gives the High Court and magistrates' courts a general jurisdiction, subject to exceptions to be carved out of it in favour of native courts by sub-section (3), over all claims arising under the provisions of the Ordinance in respect of any rights acquired under a right of occupancy. This, as we have said, does not include claims in respect of the right of occupancy or title

Oyene v. Abogu
Hurley, S.P.J.

itself. Sub-section (3) relates to suits in respect of rights arising under customary rights of occupancy or statutory rights of occupancy granted by a native authority; they are to be prosecuted in a native court of competent jurisdiction, but proceedings in respect of rights arising under a statutory right of occupancy granted by the Governor or a public officer are not within the ambit of sub-section (3) and must be taken in the High Court or a magistrate's court under sub-section (2). Since proceedings under sub-section (2) may relate to land subject to the jurisdiction of a native court and may raise issues as to title (which of course can happen even where the claim is not in respect of title), sub-section (2) gives the High Court and magistrates' courts jurisdiction which they could not otherwise have exercised. When there is no native court of competent jurisdiction, the provisions of sub-section (2) apply instead of the provisions of sub-section (3). The suits arising under a right of occupancy which are mentioned in sub-section (3), equally with the claims acquired under a right of occupancy which are mentioned in sub-section (2), are proceedings in respect of rights under the title and not proceedings in respect of the title itself. Any proceedings in respect of title, in which all the parties are persons subject to the jurisdiction of a native court, and which do not come within the class of proceedings mentioned in sub-section (1), fall within the jurisdiction of a native court of competent jurisdiction under section 19 (4) of the Native Courts Law if there is one, and if there is none they may be dealt with under the jurisdiction of the High Court under sections 11 and 12 of the High Court Law. Where all the parties are not subject to the jurisdiction of a native court, sub-section (4) applies, and the High Court and magistrates' courts have jurisdiction under that sub-section unless the land is subject to a statutory right of occupancy granted by the Governor or a public officer, when they have jurisdiction either under sub-section (1) or sub-section (2) or under the High Court Law or the Magistrates' Courts Law respectively; but in no case has a magistrate's court jurisdiction where the substantive relief claimed is a declaration of title or ownership of the land.

The answer to the learned magistrate's question on this case stated is "No".

ALHAJI ADUKU *v* COMMISSIONER OF POLICE

[C. A. (Brown, C. J. and Reed, Ag. S. P. J.) June 9, 1958]

[Makurdi—Criminal Appeal No. JD/15CA/1958]

Northern House of Assembly (Elected Members) Electoral Regulations, 1956—whether a Returning Officer appointed under sub-regulation (1) of Regulation 71 is "a person employed in the public service" as defined in section 1 of the Criminal Code.

On the 3rd October, 1956, the appellant was a candidate in the primary elections to the Northern House of Assembly. The facts which the magistrate found were:—

(*a*) that he falsely stated to the Returning Officer that he had paid his income tax for the year 1956 at Jos;

(*b*) that he knew that his statement was false when he made it.

He was convicted of giving false information to a person employed in the public service under section 125A of the Criminal Code.

Held: A person who is appointed a Returning Officer under Reg. 71 (1) of the Northern House of Assembly (Elected Members) Electoral Regulations, 1956, is not a "person employed in the public service" as defined in section 1 of the Criminal Code.

CRIMINAL APPEAL

Ademola for the appellant;

Alcock, Crown Counsel, for the respondent.

Brown, C.J., in a written judgment which was read by Reed, Ag. S.P.J., said that there was no reason to disturb the magistrate's findings of fact and continued:—

The point of law which Mr. Ademola has argued is that the Returning Officer was not "a person employed in the public service" as defined in section 1 of the Criminal Code. The Returning Officer was Ibrahim Okweje, who at the material time was the District Head of Igala Mella. A District Head, when performing his duties as such, is clearly "a person employed in the public service" under sub-head (8) of the definition. But Mr. Alcock, on behalf of the respondent, concedes that the wording of sub-head (8) precludes him from coming within that sub-head when he is employed as a Returning Officer under the Northern House

of Assembly (Elected Members) Electoral Regulations, 1956. He contends that he comes under sub-head (2), and that as Returning Officer he is performing the duties of an office to which he is appointed by or under a "statute, ordinance or law".

A Returning Officer for a primary electoral area, with which we are concerned in this case, is appointed by the Electoral Officer of the rural electoral district in which the primary electoral area is situated, under regulation 71 (1) of the Northern House of Assembly (Elected Members) Electoral Regulations, 1956. The Electoral Officer of the rural district is appointed by the Governor under regulation 4 (1). These Electoral Regulations are not made under any statute, ordinance, or law, but are made under section 37 of the Nigeria (Constitution) Order-in-Council, 1954. If they were made under a law, this Returning Officer could have been said to have been appointed under it, because by the Interpretation Ordinance "law" means an enactment of a Regional legislature and includes any order, regulation, rule of court or proclamation made under authority of a law. But as these regulations were made under the 1954 Constitution that definition cannot assist us in this case.

Mr Alcock, in contending that the Returning Officer is "a person employed in the public service" under sub-head (2) of the definition contained in the Criminal Code, has argued that the 1954 Constitution was made by Her Majesty in Council under the Foreign Jurisdiction Act, 1890; and starting with the Foreign Jurisdiction Act, 1890, and tracing it through the 1954 Constitution to the Electoral Regulations, 1956, he says that this Returning Officer was appointed under a statute, that is to say, the Foreign Jurisdiction Act, 1890. We cannot accept that argument. It seems to us that there is a lacuna in the law. The offence of a candidate giving false information to a Returning Officer has not been included among the offences contained in the Electoral Regulations; which no doubt was the reason why the prosecution charged the appellant with an offence under section 125A of the Criminal Code. The Electoral Regulations are made by the Governor, and no doubt this matter will be brought to the attention of the authority concerned. We have no option but to allow the appeal upon the ground that the Returning Officer to whom the false statement was made was not "a person employed in the public service" as defined in the Criminal Code. The conviction must be quashed and the fine of £50 must be refunded.

Appeal allowed.

KANO NATIVE AUTHORITY *v* MARKA YAR JATAU CULA

[C.A. (Brown, C. J. and Bate J.) July 16, 1958]

(Assessors:—M. Yahaya, Chief Alkali of Sokoto; M. Muhammadu Bello, Wali of Katsina)

[Kano—Criminal Appeal No. K/11A/1958]

Appeal by a Native Authority from a decision of the Moslem Court of Appeal reversing thier conviction for homicide—judicial confession made at the trial retracted before the Moslem Court of Appeal.

At her trial before the Emir of Kano's court the respondent had confessed to the murder of a child aged 12. There were no witnesses, and her conviction depended on her confession. Before the Moslem Court of Appeal she denied making that confession. The Moslem Court of Appeal treated that as a retracted confession. They agreed that the decision of the trial court had been correct. But they said that as the respondent had retracted her confession before them and there were no witnesses of the crime the conviction ought not to stand. Nevertheless they made no order and the respondent remained in custody.

Held:

(1) The rule of Maliki law regarding the retraction of confessions applies to confessions which are made out of court and retracted in court. But this was a judicial confession made at the trial, and it could not be retracted on appeal by the respondent's bare denial.

(2) As the Moslem Court of Appeal had made no order, the order of the trial court stood.

CRIMINAL APPEAL FROM THE MOSLEM COURT OF APPEAL

Nasir, *Crown Counsel*, for the appellants;

Shyngle, for the respondent.

Brown, C. J. (delivering the judgment of the Court):

This is a most unusual case because it is an appeal—not by the person convicted—but by the court by whom she was convicted of homicide, against a decision of the Moslem Court of Appeal reversing that conviction. But though unusual, we think that this appeal is fully justified in this case because it raises a most important point of Maliki law and the function

of the Moslem Court of Appeal, which is a new conception in Maliki law.

The respondent is a girl aged 20, and in the trial court she made a clear confession to murdering a girl aged 12. She described how she did it. She said that they were bathing, and that she pressed the child's chest with her hand and held her under the water. There were no witnesses; but the respondent was convicted by the Emir of Kano's court upon her confession in court. Before the Moslem Court of Appeal she retracted her confession, and said that she had never made it. The Moslem Court of Appeal applied the principle of Maliki law regarding a retracted confession; and while agreeing that the decision of the trial court was correct in convicting the respondent upon her confession, they said that that confession was no longer operative because she had retracted it before them.

We accept Mr Shyngle's argument that by section 67 (2) of the Native Courts Law, which they have power to apply by section 14 (2) of the Moslem Court of Appeal Law, they had the right to exercise the powers which are given to them by section 67, notwithstanding that the decision of the trial court was right. We accept what Mr Shyngle says, that by section 67 (1) (*b*) (*iii*) they had power to re-hear the case, in whole or in part. We accept that under section 67 (3) they had power to call fresh evidence. We are not saying that in this case they did what they had no power to do. We say that they exercised their powers wrongly. Their decision was based, not upon any belief in Marka's retraction of her confession, but upon a rule of Maliki law that a confession made out of court can be retracted in court. If it is so retracted, it must be proved by the evidence of two witnesses. But this rule applies to a confession made out of court which is retracted in the court of trial. For the reason which we are about to give it was never intended to apply to a judicial confession made in court and subsequently retracted before a court of appeal.

It must be understood that the whole conception of a court of appeal is unknown to Maliki law; and the Moslem Court of Appeal is something which is quite new in this system of law. For this reason, it is understandable that the Moslem Court of Appeal should have misapplied the rule regarding a judicial confession made in the trial court and later retracted before them. That they have misapplied it is, I think, clear from the authority upon which they base their decision. It is in Volume IV of Dasuki's Commentary on the Muhtasar, p. 318. But that authority is dealing with an extra-

Kano N. A.
v
Cuta
Brown, C. J.

judicial confession which is retracted in court. And it is necessary to point out that the English translation of the decision of the Moslem Court of Appeal is not accurate. In the English translation, the Moslem Court of Appeal is represented as quoting from that passage in Dasuki as follows:—

> "If the witness gave evidence as to the confession of the accused, but the accused still denied having confessed so, then the *higher* court would consider it as a withdrawal of his former statement."

With the assistance of our assessors, we have carefully examined the Arabic text. It contains nothing about a *higher* court; and as we have pointed out, the concept of a higher court—an appeal court—is unknown to Maliki law; and our assessors agree that that passage upon which the court of appeal have based their judgment is a passage which deals with the retraction in court of a confession previously made out of court.

We share the view of the Moslem Court of Appeal that the respondent was properly convicted in the trial court upon her own confession. We disagree with the view of the Moslem Court of Appeal in saying that her subsequent retraction before them affected the matter.

The only question which now remains is what order ought we, in the circumstances, to make. The Moslem Court of Appeal made no order. Therefore, the order of the trial court stood; and we observe that the respondent is still in custody, and has been in custody since the trial, notwithstanding the proceedings before the Moslem Court of Appeal. In those circumstances, we make no order.

ABDUSALAMI NAGOGO *v* KANO NATIVE AUTHORITY

[C.A. (Brown, C. J. and Bate, J.) July 21, 1958]

(Assessors: M. Yahaya, Chief Alkali of Sokoto; M. Muhammadu Bello, Wali of Katsina)

[Kano—Criminal Appeal No. K/12A/1958]

Appeal from the decision of the Moslem Court of Appeal dismissing an appeal against a conviction for homicide—no kasama oaths and no evidence of a wound which was of such a nature as would ordinarily cause death—confession by the appellant that he struck the deceased.

The conviction depended on the appellant's confession that he struck the deceased once. No eye-witness was called. The washers testified to bruises on the left forearm, and no other wound. But they said that blood and foam was coming out of the deceased's mouth and nose. No *kasama* oaths were taken.

Held:

(1) If a person intends to beat another, and that person dies as a result of the beating, it is intentional homicide in Maliki law.

(2) If the wounds are of such a nature as would ordinarily cause death no *kasama* oaths are required and the accused can be convicted on his bare confession of an intention to beat.

(3) But when the wounds are not of such a nature as would ordinarily cause death, as in this case, *kasama* oaths are necessary.

(4) The importance of the *kasama* oaths is that the blood relatives swear not only that the accused struck the deceased but *that it was from that blow that he died.*

(5) Death could not have been caused by the blow or blows on the forearm; and the absence of *kasama* oaths was fatal to this conviction.

[*Editorial Note:*—The importance of this case lies, first, in the fact that the court expressly stated that their own decision in *Garba Dan Ibani v Kano Native Authority*, 1958 N.R.N.L.R. 61, was incorrect in Maliki law and ought not to be followed; and that the correct view of the Maliki

Nagogo v Kano N.A. Brown, C.J.

law of intentional homicide (*amd*) is contained in their later decision of *Daddo v Bauchi Native Authority*, 1958 N.R.N.L.R. 82. It is now clear that a confession to an intention to beat though not to kill is a confession to intentional homicide if the victim dies, provided that the blows were of such a nature as would ordinarily cause death.

Secondly, this case affords an illustration of the reason for the *kasama* oaths. In the absence of direct evidence as to the cause of death the blood relatives swear fifty times that they are certain that the deceased died as a result of the blow or blows which the accused struck. In this case there was no evidence as to the cause of death. No *kasama* oaths were taken; nor, it may be suggested, would the blood relatives have been willing to take them.]

Cases referred to:

Garba Dan Ibani v Kano Native Authority, 1958 N.R.N.L.R. 61, disapproved;

Daddo v Bauchi Native Authority, 1958 N.R.N.L.R. 82, followed;

Mamman Durbawa v Gwandu Native Authority, 1958 N.R.N.L.R. 23.

CRIMINAL APPEAL FROM MOSLEM COURT OF APPEAL

Shyngle for the appellant;

Nasir, Crown Counsel, for the respondent.

Brown, C. J. (delivering the judgment of the Court):

The appellant found the deceased sitting and conversing with his (the appellant's) wife in a cornfield. There was no suggestion of an adulterous intercourse. At his trial the appellant said: "I struck him once. He got up and ran away." No witness was called who saw the deceased die. But in the "Particulars of Offence" it was stated that one Mohammadu was sitting in front of his house when the deceased came running and fell down. It was further stated in the "Particulars of Offence" that when Mohammadu asked him what had happened the deceased said that the appellant had struck him. The deceased died shortly after saying that. But what was stated in the "Particulars of Offence" was not given in evidence.

Apart from the appellant's admission that he struck the deceased once—he did not say on what part of the body —the only other material evidence at the trial was that of the two washers. Their evidence is very important. They said that the only injuries they saw on the deceased were

bruises on the left forearm. But blood and foam were coming out of his mouth and nose. Clearly death could not have been caused by the blow or blows on the forearm. In the light of the evidence of the washers the question remains unanswered: what caused the death? No purpose can be served by speculating. But the blood and foam would appear to suggest some form of internal haemorrhage; and the deceased was running when he left the cornfield, and was still running when he fell down outside Mohammadu's house.

The conviction depended solely on the appellant's admission that he struck the deceased. There were no *kasama* oaths. Mr Shyngle, who appeared for the appellant, referred us to our decision in *Garba Dan Ibani v Kano Native Authority*, 1958 N.R.N.L.R. 61, in which we held that a confession to *amd*, which is unsupported by eye-witnesses or *kasama* oaths, must be a confession that the killing was *intended*. That decision was based upon the advice which we received from our assessors in that case. We desire to state that in the light of a later case we have come to the conclusion that the decision in *Garba Dan Ibani* was not correct in Maliki law and ought not to be followed. We are satisfied that the correct view of the Maliki law of *amd* is set out in the following passage from our judgment in the later case of *Daddo v Bauchi Native Authority*, 1958 N.R.N.L.R. 82:—

> "The first ground of appeal was that the appellant did not confess to intentional homicide but to accidental homicide. We are advised by our assessors that if a person intends to beat another, and that other person dies as a result of the beating, it is homicide in Maliki law. We are also advised that if there is a confession to the intention to beat, it is a confession to intentional homicide if the victim dies."

The judgment then continues with a passage which is directly apposite to the facts of the present case:—

> "But we are advised that not in every case where there is a confession that the accused intended to beat though not to kill could *kasama* oaths be dispensed with. It depends upon the nature of the wounds inflicted. If the wounds are such that in the ordinary course of nature they would cause death, as in this case where the brain was 'broken', no *kasama* oaths would be necessary. But if the wounds are of such a nature that death would not ordinarily be caused, as for example where the

Nagoge
v.
Kano N.A.

Brown, C.J.

victim is cut with a sword on his leg and death ensues, then the *kasama* oaths would be required."

The importance of the *kasama* oaths is that the blood relatives swear fifty oaths, in the circumstances of solemnity that have been described in the case of *Mamman Durbawa v Gwandu Native Authority*, 1958 N.R.N.L.R. at page 23, that they are positive not only that the accused struck the deceased but also that it *was from that blow that he died.*

We are all agreed that, upon the facts of the present case, the absence of *kasama* oaths is fatal to this conviction. That is the advice which we have received from our assessors; and it has very properly not been challenged by counsel appearing for the native authority. It was suggested that we might consider ordering a retrial under section 67 (1) (*b*) (*ii*) of the Native Courts Law. That would involve a retrial *de novo*, which would include giving an opportunity to the blood relatives to take the *kasama* oaths. In our view no purpose would be served by it, because having regard to the only injury which was found on the body it would be impossible to say that it was from that blow that he died.

The conviction and sentence must be set aside, and the appellant must be discharged.

Appeal allowed.

I. F. LANIYAN *v* S. A. ISAAC

[High Court (Hurley, S.P.J.) July 3, 1958]

[Zaria—Civil Action—No. Z/10/1957]

Jurisdiction of High Court—Claim for recovery of possession of land held under certificate of occupancy—Whether action raising issue of title to land—Whether defence raising bona fide claim of title—Section 21 (4) *Land and Native Rights Ordinance Cap.* 105—*Whether plaintiff subject to the jurisdiction of the native courts—Yoruba residing in the Western Region—Section* 15 (1) *Native Courts Law*, 1956—*Section* 15 (1) (*a*) *and section* 15 (1) (*c*) *thereof.*

The plaintiff claimed from the defendant possession of a plot in Zaria over which he held a statutory right of occupancy granted by the Zaria Native Authority, alleging that the defendant was a trespasser holding over after the death of his father who was the plaintiff's tenant. The defence as amended was that the defendant's father became co-owner of the land by agreement with the plaintiff and that the defendant succeeded to his father's interest.

Counsel for the defendant contended that the High Court had no jurisdiction in the suit because it raised an issue of title to land subject to the jurisdiction of the native court.

Counsel for the plaintiff while conceding that the land was subject to the jurisdiction of the native court contended that the plaintiff being a Yoruba residing in the Western Region was not a person subject to the jurisdiction of the native courts in Zaria because he did not come within either of the classes defined in section 15 (1) (*a*) or (*c*) of the Native Courts Law, 1956.

Held:

(1) The test to be applied in order to determine the question of whether an action raises an issue of title to land within the meaning of section 16 (1) (*a*) of the Northern Region High Court Law, 1955, is that there must be a *bona fide* claim of title, and the right claimed must be one which in point of law is capable of existence.

(2) The suit in question did raise an issue of title to land.

(3) Those classes of persons defined in sections 15 (1) (*a*) and 15 (1) (*c*) of the Native Courts Law, 1956, are

Laniyan v Isaac

Hurley, S.P.J.

special classes additional to the general class of persons made subject to the jurisdiction of native courts by section 15 (1) of the Law.

(4) The plaintiff not only came within that general class defined in section 15 (1) but also within those classes defined in subsections (*b*) and (*f*) of that section.

(5) The Zaria Native Courts had jurisdiction but the High Court had none.

Per curiam: The test laid down in (1) above cannot always be applied without hearing some evidence in support thereof, but if the defence raises a *bona fide* claim of title capable of existing in law, and the jurisdiction of the High Court is thereby ousted, it is immaterial to the proceedings before a judge of the High Court whether such title can be established or not, for that it is not a matter which the High Court can decide.

Cases referred to:

Aburime v Assemblies of God Mission, 14 W.A.C.A. 185 followed;

Lloyd v Jones, (1848) 6 C.B. 81 applied.

CIVIL ACTION

Lewis Thomas for the plaintiff;

Razaq for the defendant.

Hurley, S.P.J.: The claim in this action, as now amended, is for the recovery of possession of Plot D 35, Sabon Gari, Zaria, from the defendant as a trespasser overholding after the death of his father who was the plaintiff's tenant. The plaintiff holds a statutory right of occupancy over the plot from the Zaria Native Authority. The action was begun in the Magistrate's Court, Zaria, and a written defence was filed in that court, contrary to the provisions of Order 22, rule 1, of the Magistrates' Courts (Northern Region) Rules, 1955. The defence disclosed was to the effect that the defendant had an interest in the land, and the Magistrate reported the case to the Acting Chief Justice, as presiding judge in the Zaria Judicial Division, for an order transferring it to this court as being outside the Magistrate's jurisdiction because the defendant was claiming title to the land. The order of transfer was made, and upon the case coming up before this court at the Zaria sessions it was ordered that the defence filed in the Magistrate's Court should stand as the defence in this court.

Defending Counsel then objected that by virtue of section 16 (1) (*a*) of the High Court Law this court had no jurisdiction to entertain the action because it raised an issue as to the title to the land, which is subject to the jurisdiction of a native court. Having heard argument on the objection, Smith, Ag. S.P.J. held that it was too early to give a ruling, because the claim as it then was did not disclose on what ground the plaintiff was claiming possession, and because there was neither evidence nor admission that title to land was raised in the action: *Aburime v. Assemblies of God Mission*, 14 W.A.C.A. 185.

The claim has now been amended and some evidence has been heard, and it is clear that the suit does raise an issue as to title to land. A County Court in England has no jurisdiction, save as is otherwise specially provided, to hear an action in which the title to any hereditament is in question. To oust the jurisdiction of a County Court on the ground that title to a hereditament is in question, there must be a *bona fide* claim of title, and the right claimed must be one which in point of law is capable of existence: *Lloyd v Jones*, (1848) 6 C.B. 81. The like test, in my opinion, is to be applied in order to determine whether an action raises an issue as to the title to land within the meaning of section 16 (1) (*a*) of the High Court Law. As the County Court cases show, it is a test which cannot always be applied without hearing some evidence. *Aburime v Assemblies of God Mission* was a case where evidence had to be heard before it could be said that there was an issue of title, because the claim there was in trespass and the defence, apparently, consisted of the bare averment that the issue was as to title of land. In the case now before me, the defence is that the defendant's father became co-owner of the land by agreement with the plaintiff and that the defendant succeeded to his father's interest. In support of that, the defendant pleaded an agreement concerning the land made between the parties after the defendant's father's death. That agreement was put to the plaintiff in the witness box and he admitted that he signed it. It was tendered in evidence, and objected to on the ground that it was not registered under section 15 of the Land Registration Ordinance. To decide the question of admissibility, it is of course necessary to decide whether the agreement, which provides *inter alia* that the defendant is to "continue to occupy and control portions of the premises that had been apportioned to his late father", is an instrument within the meaning of the definition in section 2 of the Ordinance, as conferring or transferring an interest in land. But a decision about that

Laniyan v. Isaac
Hurley, S.P.J.

will be an essential step towards the decision of the case, and it is a decision which I cannot make if this court has no jurisdiction. If the defence raises a *bona fide* claim of title capable of existing in law, and the jurisdiction of this court is thereby ousted, it is immaterial to the proceedings before me in this court whether the defendant is in a position to establish his claim or not, for the claim is not one that can be decided upon here. Whether the defendant's contentions can be proved or not, he has, I am satisfied, raised a *bona fide* claim of title capable of existing in law; the question remains whether the jurisdiction is thereby ousted in this case.

On that, I am referred to the arguments submitted to Smith, Ag. S.P.J. The land, it is conceded, is subject to the jurisdiction of a native court. But it is submitted that this court has jurisdiction under section 21 (4) of the Land and Native Rights Ordinance because the plaintiff, who resides in the Western Region, is not a person subject to the jurisdiction of the native courts in Zaria, since he is not within either of the classes defined in section 15 (1) (*a*) or (*c*) of the Native Courts Law, 1956. Those classes are special classes additional to the general class of persons made subject to the jurisdiction of native courts by section 15 (1). The general class is "persons and classes of persons who have ordinarily been subject to the jurisdiction of native tribunals" and there can be no doubt that the plaintiff, an elderly Yoruba who appears to be barely literate and who speaks little, if any English, belongs to that general class. Besides, he appears to belong also to two of the additional classes, those defined in paragraphs (*b*) and (*f*) of section 15 (1). I am fully satisfied that he is a person subject to the jurisdiction of the Zaria native courts. It follows that the Zaria native courts that have land jurisdiction for the area where the land is have jurisdiction in this case, which concerns a right of occupancy granted by a native authority; and this court has none. The action will be struck out.

Action struck out for want of jurisdiction.

FRIDAY AMAECHI *v* COMMISSIONER OF POLICE

[C.A. (Brown, C.J. and Bate, J.) July 22, 1958]

[Kano—Criminal Appeal No. K/20A/58]

Receiving money for showing a favour contrary to section 100 *of the Criminal Code—corruptly receiving money with regard to an application for employment in the public service contrary to section* 112 (1) *of the Criminal Code—whether charges under these sections can be substantiated when the offence is purely that of obtaining money by false pretences and there is no evidence that the accused in fact had the power to show any favour or to influence the giving of the employment.*

The appellant received money from four people by representing that he could assist them to obtain employment in the public service. The magistrate found that he had no influence whatever which would have enabled him to assist in the employment being obtained. He was convicted upon four charges under section 100, and four charges under section 112 (1), of the Criminal Code.

Held:

(1) The appellant's offence was purely that of obtaining money by false pretences contrary to section 419.

(2) In order to substantiate charges under section 100 or section 112 (1) there must be evidence that the appellant was in such a position that he was able to show a favour or to influence the giving of employment.

Held also: That the appellate court would not exercise its power under section 48 (*a*) (*ii*) of the High Court Law to alter the findings so as to find the appellant guilty under section 419, because the essence of the charges which the appellant had been called upon to meet was that he had improperly and corruptly *used* his official position to influence the results of the applications for employment; and the essence of an offence under section 419 is that he *falsely pretended* that he had some influence when in fact he had none.

Cases referred to:

Rex v Maxwell Jaja, 15 N.L.R. 97, distinguished:

Awuah v Commissioner of Police, XIII W.A.C.A. 1, applied;

Samuel Owu v Commissioner of Police, XIII W.A.C.A. 103, applied.

CRIMINAL APPEAL

Shyngle for the appellant;

Nasir, *Crown Counsel*, for the respondent.

Brown, C.J. (delivering the judgment of the court):

There are no merits in the facts of this appeal. The appellant is a clerk in the Audit Department. The evidence is clear that he received money from four people by representing that he could assist each of them to obtain employment as a messenger in the department in which he was employed. He was convicted upon four charges of receiving money for showing a favour under section 100 of the Criminal Code; and upon four charges of corruptly receiving money on account of something to be done by him with regard to an application for employment in the public service contrary to section 112 (1) of the Criminal Code.

It will be convenient at this stage if we analyse each section and set out the ingredients which the prosecution must prove. The ingredients of section 100 are:—

(*a*) that the accused is employed in the public service;
(*b*) that he received a benefit;
(*c*) on the understanding, express or implied, that the accused will favour the person giving the benefit;
(*d*) in any transaction then pending or likely to take place;
(*e*) between the person giving the benefit and any person employed in the public service.

The ingredients of section 112 (1) are:—

(*a*) that the accused received a benefit;
(*b*) that he received it corruptly;
(*c*) on account of anything to be done;
(*d*) with regard to an application for employment;
(*e*) in the public service.

We are concerned with the question of whether the evidence in this case establishes ingredient (*c*) of either section. If the appellant had no power to give or to influence the giving of the employment, can he be said to have received the money "on account of anything to be done with regard to the application for employment" (section 112 (1)) or "on the understanding that he would favour the person giving the benefit" (section 100)? If that can be said, then it would appear to be immaterial whether the charge is laid under section 419 (false pretences) or whether it is laid under section 100 or section 112 (1).

It is clear from the case of *Rex v Maxwell Jaja*, 15 N.L.R. 97, that the actual power to give the employment is not essential to bring the accused under section 112 (1), and that it is sufficient if the accused had the power to influence the giving of the employment. But the facts in this present case are very different from the facts in that case. Here the learned Magistrate found as a fact that "the accused had no influence whatever". But he took the view that in law "the sections do not state that the recipient must be in a position to help with regard to the employment or favour sought"; and that "the act 'to be afterwards done' need not even have a hope of a successful result." This view would lead to the conclusion that a charge of false pretences under section 419 or a charge under section 100 or under section 112 (1) would all be equally applicable.

We cannot accept that conclusion; and Crown Counsel did not seek to support it. He conceded that if the facts of this case showed that the appellant had no power at all to influence the applications for employment, it was a case purely of false pretences and the convictions under section 100 and 112 (1) could not be maintained. But he said that if the evidence showed that the appellant had any influence, however slight, the charges were properly laid under the two sections; and he referred us to one passage in the evidence of Mr Gales, the Acting Principal Auditor, as showing that the appellant might have been able to influence these applications. Mr Gales said that it was the appellant's duty to attend to the receipt and despatch of letters. He said that it was the Director of Audit who employed messengers, although that power had recently been delegated to him (Mr Gales). He said that correspondence came to him (Mr Gales) first. And then he said that "people may have come to the accused." In our view that is far from showing that the appellant could have any influence in obtaining employment for the people who might come to him; and it is contrary to the Magistrate's finding of fact. This was clearly a case of false pretences under section 419. The appellant falsely represented to the four persons concerned that he had the power to influence the results of their applications for employment, when in fact he had no such power. In our view the essence of an offence under section 100 or section 112 (1) is that the accused improperly or corruptly uses his position to commit the mischiefs which are contemplated by the sections, and not that he uses his position to pretend falsely that he is able to commit or to influence the commis-

Amaechi v. C. of P. Brown, C.J.

sion of those mischiefs. In the latter case his offence is one of false pretences under section 419.

The demerits of this case being so clear upon the facts, we were invited to examine the power which is conferred upon us by section 48 (*a*) (*ii*) of the High Court Law and alter the findings on these charges to findings of guilty under section 419. We have considered the case of *Awuah v Commissioner of Police*, XIII W.A.C.A. 1; and the case of *Samuel Owu v Commissioner of Police*, XIII W.A.C.A. 103. If the charges had been laid under section 419, the essence of the offence which the appellant would have been called upon to meet was his false pretence that he had power to influence the applications for employment. Upon the charges as laid under sections 100 and 112 (1) the essence of the offences which he had to answer was that he improperly and corruptly received the money in order to use his official position as a clerk in the office to influence the results of the applications. We are in no doubt that to exercise our power under section 48 (*a*) (*ii*) in this case would be contrary to accepted judicial principles.

We would only add, and repeat what has often been said in the past, that the law relating to official corruption and kindred offences is not easy and that the advice of the Law Officers should be sought, wherever possible, before proceedings are undertaken. In this case it would appear that a charge under section 419 could have been clearly substantiated. And we note that a summons for an offence under that section appears to have been issued when the proceedings started, but that no evidence was offered in support of it and that charge was withdrawn.

The appeal must be allowed. The convictions and sentences are set aside. The appellant is ordered to be discharged.

Appeal allowed.

ATINI ATEZE *v* ALHAJI MOMO

[C.A. (Hurley, S.P.J. and Reed, J.) July 19, 1958]

[Makurdi—Civil Appeal No. JD/10A/1958]

Slander—words complained of set out in plaint in substance but not verbatim—Order II rule 1, *Order III rule* 1, *and Order XIV of the Magistrates' Courts (Northern Region) Rules*, 1955—*section* 54 *of the Northern Region High Court Law*, 1955—*false imprisonment—no arrest or other form of restraint.*

The magistrate gave judgment in favour of the respondent for damages for slander and false imprisonment. The plaint contained the substance of the words complained of, but did not quote the actual words. Counsel for the appellant, relying on English authorities, made this his first ground of appeal.

Upon the issue of false imprisonment the evidence was that the appellant made the allegation of bribery, which was the slander complained of, to the Tiv Court in session. The matter was thereupon referred to the Police to investigate, and the respondent accompanied a policeman to the charge office. There was no arrest, no legal process, no submission, and no constraint.

Held:

(1) The Magistrates' Courts Rules provide that the substance of the action should be stated in the plaint; they do not require that a plaintiff should do more than disclose in writing the substance of his action and such particulars as he thinks fit.

(2) This is subject to the right of a party to apply to the magistrate to make any amendment which is necessary to determine the real question in issue. No such application was made in this case.

(3) The appellant was not deceived or misled, and section 54 of the High Court Law precluded the objection being taken on appeal.

(4) In order to substantiate an action for damages for false imprisonment, the plaintiff must show that his freedom was restrained, and there was no evidence that it was.

CIVIL APPEAL

Aniagolu for the appellant;

Agbakoba for the respondent.

Ateze v. Momo

Hurley, S.P.J.

Hurley, S.P.J., delivering the judgment of the court:

This is an appeal against a judgment in the court of the Magistrate Grade I, Makurdi, in favour of the respondent for damages of £75 for slander and £10 for false imprisonment. The first ground of appeal concerns the claim in slander only; it is that the claim is defective in that it does not set out the words complained of. The claim is as follows: —"On a date in June at Sankara the defendant falsely and maliciously said and published of the plaintiff to the hearing of many people to wit John Gboko and others in Tiv language conveying the meaning that the plaintiff had committed a punishable offence namely, the felony of bribery or official corruption by offering him the defendant the sum of £1 so as to deflect him from the honest and impartial performance of his duty." Mr. Aniagolu for the appellant has cited passages from Gatley's *Libel and Slander* which quote English cases showing that in an action for slander the actual words used must be set out verbatim in the statement of claim in the language in which they were spoken, followed by a literal translation if they were not spoken in English; and he submits that the respondent ought not to have had judgment because his claim did not set out the actual words used accompanied by a translation. The cases in *Gatley* are all cases in the superior courts in England, tried in accordance with the rules of practice and procedure in those courts. As Mr. Agbakoba for the respondent points out, the procedure in the magistrate's court which tried this case is regulated by the Magistrates' Courts Rules, 1955. Order II, rule 1 of those Rules provides that civil proceedings in a magistrate's court are to be begun by entering a statement in writing called a plaint, stating the names and last known places of abode of the parties and the substance of the action intended to be brought. Under rule 2 (1), a plaint may be refused if it discloses no cause of action or is in respect of a matter outside the jurisdiction of the court. When a plaint is entered, the court, under Order III, rule 1, must issue a summons in the prescribed form. The forms provide that particulars of the claim should be annexed to the summons, but the form and contents of such particulars are nowhere prescribed. The Rules, then, do not require that a plaintiff should disclose in writing more than the substance of his action and such particulars as he may think requisite.

That is subject to this, that the magistrate, upon due application being made under Order XIV, may make all such amendments in the proceedings as may be necessary for the purpose of determining the real question in issue between

the parties. There was no application to amend in the magistrate's court in this case. Section 54 of the High Court Law precludes objection, on an appeal from a magistrate's court, to any proceeding in the magistrate's court for any defect or error which might have been amended by the magistrate's court or to any complaint, summons, warrant or other process of the magistrate's court for any alleged defect therein in substance or in form, unless, however, the error or defect appears to have deceived or misled the appellant. It has not been suggested here that the appellant was deceived or misled by the way in which the respondent's claim was stated. If it was not stated so as to disclose the substance of the action, we might have to consider whether the respondent must not have been deceived or misled. Mr Aniagolu submits that, in an action for defamation, the actual words used are the substance of the action, and must be stated in the claim, because it is for the court to decide whether they are defamatory or not—which is to say, whether any cause of action is disclosed for the purposes of rule 2 (1) of Order II. There is force in that submission, and if a plaintiff in libel or slander wishes to be sure of disclosing the substance of his action he should set out in his plaint or particulars the actual words alleged. But it does not follow in every case where the words are not set out verbatim that the substance of the action is not disclosed. Here, the substance was that the appellant said the respondent had offered him a bribe, which was defamatory if untrue. In fact, the appellant admitted in so many words that he had said the respondent had offered him a bribe; his defence was that it was the truth. We see no substance in this ground of appeal.

The other ground of appeal is that the judgment is not supported by the evidence. In view of the appellant's admission of the substance of the slander, and the clear, credible and ample evidence that it was untrue, this ground need only be considered in relation to the judgment on the claim for false imprisonment. The allegation of bribery was made by the appellant to the Tiv Central Court in session. The Councillor for Police thereupon said that the matter should be investigated by the police. On that advice, the court handed the matter over to the police to investigate there and then. It is not at all clear that the court was not acting judicially rather than ministerially when they did that; it is not clear whether they were doing what their duties gave them no option of declining to do, or whether they acted in their discretion. It appears more likely that they acted judicially, in which event the case was one of malicious

Ateze v. Momo
Hurley, S.P.J

prosecution and not false imprisonment. But we do not decide whether the court acted judicially or ministerially, because it seems to us that the evidence does not show that the respondent suffered any imprisonment, that is to say, any restraint of his liberty. Restraint of liberty may be exercised by physical force amounting to an assault, or by the apprehension of such force, or by submission to legal process. What happened here was this: when the court said the matter should be investigated by the police, then, according to the plaintiff, "a Yandoka took me to the charge office. I later made a statement to the police and I was released." His two witnesses said he was taken away by a Yandoka. One said "I did not say plaintiff was arrested." Upon this evidence, there was no force. There was no show of force, and no evidence from the plaintiff or from any other source to suggest that he apprehended any force. There was no legal process such as an arrest. The plaintiff was not shown to have been constrained either by force, or by the apprehension of force, or by legal process. It is true that the police "took" the respondent to the Charge Office. We hear evidence to the like effect over and over again in this court. A constable asks a man to accompany him to the Charge Office, and he does. There is no arrest, no legal process, no submission, and no constraint. The man is entitled to refuse to accompany the constable. If he does refuse, the constable is entitled to arrest and bring him with him; but he cannot compel him to come unless he arrests him. No doubt the man prefers to comply with the constable's request rather than risk arrest; but he cannot complain of imprisonment until his freedom is restrained, and nothing short of submission to legal process can effect that. In our opinion the appeal must succeed on the judgment so far as it relates to the claim for false imprisonment.

Appeal allowed in part.

MAINA KOLO *v* ZAKARI CHIDAWA

[C.A. (Hurley, S.P.J. and Reed, J.) July 19, 1958]

[Makurdi—Civil Appeal No. 21A/1958]

Jurisdiction of magistrate—claim for declaration of title or for possession of land held under statutory right of occupancy granted by a native authority—section 21 *Land and Native Rights Ordinance, Cap.* 105—*section* 18 (1) (*d*) *and* 18 (3) *Magistrates Courts (Northern Region) Law*, 1955—*Power of transfer under section* 32 (2) *Native Courts Law*, 1956.

When there is no native court of competent jurisdiction in the area where the land is situate, the jurisdiction conferred upon a magistrate in land cases is that conferred upon him by section 21 of the Land and Native Rights Ordinance. Whether the claim is for a declaration of title or for recovery of possession, and whether the land is held under a customary right of occupancy or a statutory right of occupancy granted by a native authority, a magistrate has no jurisdiction under section 18 (1) (*d*) and (3) of the Magistrates Courts Law unless the Land and Native Rights Ordinance gives it to him.

Obiter: Section 32 (2) of the Native Courts Law gives no power to make an order of transfer until an order for a stay has been made under sub-section (1).

Per Curiam: Section 32 (2) provides for a *direction* that the case be "inquired into, tried, and determined" by a magistrate's court, and the order of transfer should be in that form.

Cases referred to:

Salemetu Oyene v Salihu Abogu, 1958 N.R.N.L.R. 103 distinguished.

Toriola v Arewa, 12 W.A.C.A. 505, followed.

CIVIL APPEAL

Aniagolu for the appellant;

Respondent in person.

Hurley, S.P.J., delivering the judgment of the court:—

This case was begun in the Makurdi Mixed Court. Before proceeding to judgment, the Alkali of Makurdi asked for the case to be transferred to the magistrate's court on the ground that it was a land case and therefore outside the

Kolo v Chidawa — Hurley S P J

jurisdiction of the Mixed Court. The District Officer made an order transferring the case to the Magistrate Grade I, Makurdi, under section 32 of the Native Courts Law, 1956. The magistrate, in the exercise of his original jurisdiction, tried and determined the case, and this appeal is against his judgment..

One of the grounds of appeal is that the case was outside the magistrate's jurisdiction. In *Salemetu Oyene v Salihu Abogu*, 1958 N.R.N.L.R. 103, this court held that a magistrate has no power to entertain a suit for a declaration of title of ownership of land held under a customary right of occupancy where the parties to the suit are persons subject to the jurisdiction of a native court and there is no native court of competent jurisdiction in the area where the land is situated. In the present case, the dispute was over the ownership of a piece of land in Makurdi. The plaintiff's claim was for "the hut and indigo pits which my father has been occupying for over forty-five years". He alleged that the land had been his father's and that the defendant was occupying it "by force". The defendant gave evidence that the land had been the property of one Atahir Maigoro from whom he had bought it, and he relied on certificates of occupancy and transfer from the Makurdi Native Authority. The parties to the proceedings are undoubtedly persons subject to the jurisdiction of a native court. There is no native court of competent jurisdiction in the area where the land is situated. The magistrate in his judgment found that the facts were as alleged by the plaintiff, and the judgment demonstrated that the certificate of occupancy had been tampered with for the purposes, as the magistrate put it, of a "cheap little swindle." He gave judgment "for plaintiff with declaration of title accordingly and £10 10*s* 0*d* costs."

This case is distinguishable from the case of *Salemetu Oyene v Salihu Abogu* in two respects. First, the claim in this case is not in terms a claim for a declaration of title, and indeed it is not clear that it is not rather a claim for recovery of possession; and secondly, the land is not held under a customary right of occupancy, but under a statutory right of occupancy granted by a native authority. The second point of difference is not material; the same sections of the same enactments, and in particular sub-sections (3) and (2) of section 21 of the Land and Native Rights Ordinance, govern a claim for a declaration of title in the circumstances of *Oyene's* case whether the land is held under a customary right of occupancy or a statutory right of occupancy granted

by a native authority, and the consequence is the same either way, that is, that a magistrate's court has no jurisdiction.

As to the first point of difference, whether the claim here was a claim to be declared the owner of the land, or a claim to be put in possession of it, the result appears to us to be the same. If the claim is for a declaration, we apply *Salemetu Oyene v Salihu Abogu*, and say that the magistrate had no jurisdiction. If the claim is for recovery of possession, the case is still not one over which the magistrate had any jurisdiction under section 18 (1) and (3) of the Magistrates' Courts Law, unless he had jurisdiction under the Land and Native Rights Ordinance. The fact that the case came to him on transfer from a native court, which by virtue of section 18 (2) (*b*) (*ii*) prevented his jurisdiction from being barred by the issue of title, gave him no jurisdiction where he had none otherwise: *Toriola v Arewa*, 12 W.A.C.A. 505. Under section 21 (3) of the Land and Native Rights Ordinance, if there had been a native court of competent jurisdiction in the area, it would have had jurisdiction in the case, assuming that the case is a suit in respect of rights arising under a right of occupancy; but, there being no such native court, sub-section (2) would apply on the further assumption that the case is a claim arising under the provisions of the Ordinance in respect of rights acquired under a right of occupancy. There is no other way in which this case could be one over which the magistrate had jurisdiction under the Land and Native Rights Ordinance. We need not inquire into the correctness of the assumptions which seem necessary to bring the case within the provisions of the sub-sections mentioned, for even if the case fits into the sub-sections, it remains a case outside the jurisdiction conferred on the magistrate by section 18 of the Magistrates' Courts Law. That is because, as was said in *Oyene's* case, section 21 of the Land and Native Rights Ordinance confers no jurisdiction on a magistrate's court which the magistrate's court does not otherwise possess and which the High Court does possess. The High Court has jurisdiction in land cases of every kind, subject to restrictions on its exercise where there is a native court with jurisdiction, which is not the case here; and the provisions of section 21 of the Land and Native Rights Ordinance, incorporated into sub-section (1) of section 18 of the Magistrates' Courts Law by paragraph (*d*) of the sub-section, do not operate to enlarge a magistrate's jurisdiction as that jurisdiction is set out in the remaining paragraphs of the sub-section. The position of the present action remains the same if it is not a suit in respect of rights arising under a

Kolo v. Chidawa — Hurley, S.P.J.

right of occupancy, or if it is not a claim arising under the provisions of the Land and Native Rights Ordinance in respect of rights acquired under a right of occupancy; it remains a case outside the jurisdiction of a magistrate's court, and the only court with jurisdiction is the High Court.

For the foregoing reasons, the appeal must succeed on the ground of want of jurisdiction in the magistrate's court. Besides those reasons, we think it may be useful to observe that there are two reasons for questioning the magistrate's jurisdiction. One is that there was no evidence or admission of the value of the land, and it was not shown to be worth less than £200. The other is that the record discloses no order by the District Officer staying the hearing of the case in the Makurdi Mixed Court before he transferred it to the magistrate. Sub-section (2) of section 32 of the Native Courts Law does not give any power to make a transfer order until an order for a stay has been made under sub-section (1). And it may be helpful also to point out a formal defect in the transfer order; it is expressed as an order that the case be transferred to the magistrate's court, but what section 32 (2) provides for is a direction that the case be inquired into, tried and determined by a magistrate's court.

This appeal will be allowed, and there will be an order under section 42 (*c*) of the High Court Law that the case in the magistrate's court be struck out and that the respondent, if he applies, may have a free summons in this court against the defendant and any person or body he may wish to join.

Appeal allowed.

SAANYAM DZAKPE *v* TIV NATIVE AUTHORITY

[C.A. (Hurley, S.P.J. and Reed, J.) July 18, 1958]

[Makurdi—Criminal Appeal No. JD/36CA/1958]

Section 34 *Native Courts Law*, 1955—*meaning of "any course with regard to the cause or matter which it considers that justice requires"—duty of native court to which the case is transferred—appellant convicted of offence other than offence with which he was charged—contrary to natural justice.*

The appellant was brought before the native court of Ngenev on the complaint that he had burnt the house of one Vaachia; and witnesses were heard. The Ngenev court transferred the case to the Tiv Central Court, where no evidence was taken and the court proceeded as if the case had come before them as an appeal. They held that the record of the Ngenev native court disclosed no proper evidence that the appellant had burnt the house; but they said that there was evidence that he had spoken ill of Vaachia; and they fined him £10.

Held:

(1) The words in section 34 of the Native Courts Law, 1955, "and such other native court may take any course with regard to the cause or matter which it considers that justice requires" are limited by the character of the case itself. Thus if a native court which is trying a case in the exercise of its original jurisdiction transfers the case to any other native court, that other native court must try the case in the exercise of its original jurisdiction; it cannot deal with it as an appeal or as a case for review. Equally, if the case came before the transferring court as an appeal, the court to which the case is transferred must hear it as an appeal.

(2) It is contrary to natural justice that a person should be convicted or punished for an offence in respect of which there is no complaint or charge.

Case referred to:

Dominic Ogoja v Adamawa Native Authority, 1958 N.R.N.L.R. 35, applied.

CRIMINAL APPEAL

Agbakoba for the appellant;

Alcock, Crown Counsel, for the respondent.

Dzakpe v. Tiv N.A. Hurley, S.P.J.

Hurley, S.P.J., delivering the judgment of the court:

The appellant was brought before the Native Court of Ngenev on a complaint that he had burnt the compound of one Vaachia. Having heard witnesses, the Ngenev court, as we understand the record, wished to impose a settlement. Each of the parties said he was not satisfied with that and wished to appeal, though it does not appear that any judgment had been pronounced. The Ngenev Court then said that they had transferred the case to the Tiv Central Court. There is no order of transfer on the record, but we are satisfied that the case was transferred; it came up before the Tiv Central Court, and that court had no jurisdiction to entertain it otherwise than upon transfer, for the appeal from the Ngenev court does not lie to the Tiv Central Court but to the Ukum/Shitire Intermediate Court. The Tiv Central Court did entertain the case; but they proceeded upon the record of proceedings in the Ngenev court as if the case were before them on review or appeal, and heard no witnesses. The evidence in the Ngenev court included evidence that the appellant had said, in Vaachia's absence, that Vaachia was a small boy and was his enemy, siding against him in a dispute over a farm, and so Vaachia would "see something", or would "see some bad thing for his side." The Central Court asked the appellant did he agree with the witnesses who declared he was speaking ill of Vaachia, and the appellant said he did not agree with them, and denied that he had spoken ill of Vaachia. The Central Court then observed that there were no proper witnesses that the appellant had burnt the compound, but there were proper witnesses that he had spoken ill of Vaachia; it was not lawful to speak ill of anybody behind his back, and the appellant was liable for that; and they fined him £10.

The appeal to this court is against that decision of the Tiv Central Court. The appeal has been argued on three grounds: that the offence for which the appellant was punished was no offence in Tiv law and custom; that the proceedings were contrary to natural justice in that the appellant was not charged with the offence for which he was punished; and that it was unlawful for the Central Court to proceed on evidence which had not been given before it.

On the first ground, that (as Counsel pleaded it) to speak ill of a person in his absence is not an offence against Tiv law and custom, or (as the appellant originally pleaded it himself) it is not an offence where the person spoken of is an "ordinary person", our Assessors have assured us that in Tiv

law and custom it is punishable to speak ill of somebody in his absence, whether he is an important person or someone otherwise out of the ordinary, or just an ordinary person. They have also assured us that the words attributed to the appellant by the witnesses did constitute speaking ill of Vaachia and were punishable. This ground of appeal therefore fails.

The second ground of appeal is that the proceedings were not in accordance with natural justice because the appellant was not charged with the offence for which he was punished. In *Dominic Ogoja v. Adamawa Native Authority*, 1958 N.R.N.L.R. 35, this court observed that it was contrary to natural justice to convict and sentence a person without accusing him. A defendant cannot have a just trial unless he knows what he is being tried for, so that he can recognise the relevance of what is said against him, and answer it. Punishment or a conviction for an offence which has not been disclosed to the defendant by a charge or complaint or in some other way is not grounded on a just trial. In our opinion proceedings so conducted offend against natural justice. That being so, we have not inquired whether in this respect the proceedings of the Central Court offended against Tiv law and custom. This ground of appeal must succeed.

The third ground of appeal is that it was unlawful for the Central Court to proceed on evidence which had not been given before it. In transferring the case to the Central Court, the Ngenev court acted under section 34 of the Native Courts Law, 1955, which says "A native court may order the transfer of any cause or matter either before trial or at any stage of the proceedings before judgment is given to any other native court of competent jurisdiction and such other native court may take any course with regard to the cause or matter which it considers that justice requires." When a case is transferred under that section, it comes before the second court as the same case that was before the first court, to be dealt with in the way the first court was to deal with it and in no other way. If the case in the first court was a case for trial in the exercise of the first court's original jurisdiction, it is a case for trial in the second court. If it was an appeal in the first court, it remains an appeal when it is before the second court. The power which the section gives to the second court to take any course with regard to the case which it considers that justice requires must in our view be limited by the character of the case itself. If it comes as a case at first instance, the second court must try it, in the exercise

Dzakpe v. Tiv N.A. Hurley, S.P.J.

of an original jurisdiction and in accordance with the rules of procedure which govern the exercise of that original jurisdiction. It should not proceed upon the case as a case under appeal, or as a case for review. If the case comes as an appeal, on the other hand, it must be heard as an appeal in the exercise of an appellate jurisdiction. Here, the case came to the Central Court as a case at first instance, and the Central Court had power only to deal with it as such. We have consulted the Assessors about the Tiv law and custom governing the procedure upon a trial, and they say that under that law and custom a court may not try a case without having the witnesses before it and hearing what they say, subject to this, that a court may try a case by reading a written record of what witnesses have said, and without seeing or hearing them, provided that the parties agree with what is written. In this case, the Central Court did not hear the witnesses upon whose evidence it decided to punish the appellant, and he did not admit the truth of what they had said. The Central Court's duty was to try the case, not merely to review the proceedings of the Ngenev court, or proceed as if they were hearing an appeal from that court; and they did not try the case in accordance with Tiv law and custom. Therefore the appeal must succeed on the third ground also.

The appeal must be allowed. In the circumstances of the case, we think the proper course is to order the retrial of the appellant on a charge of speaking ill of Vaachia in his absence, before the Ukum/Shitire Intermediate Court, if that court has jurisdiction under its warrant, and if not, then before the Tiv Central Court.

Appeal allowed.
Re-trial ordered.

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